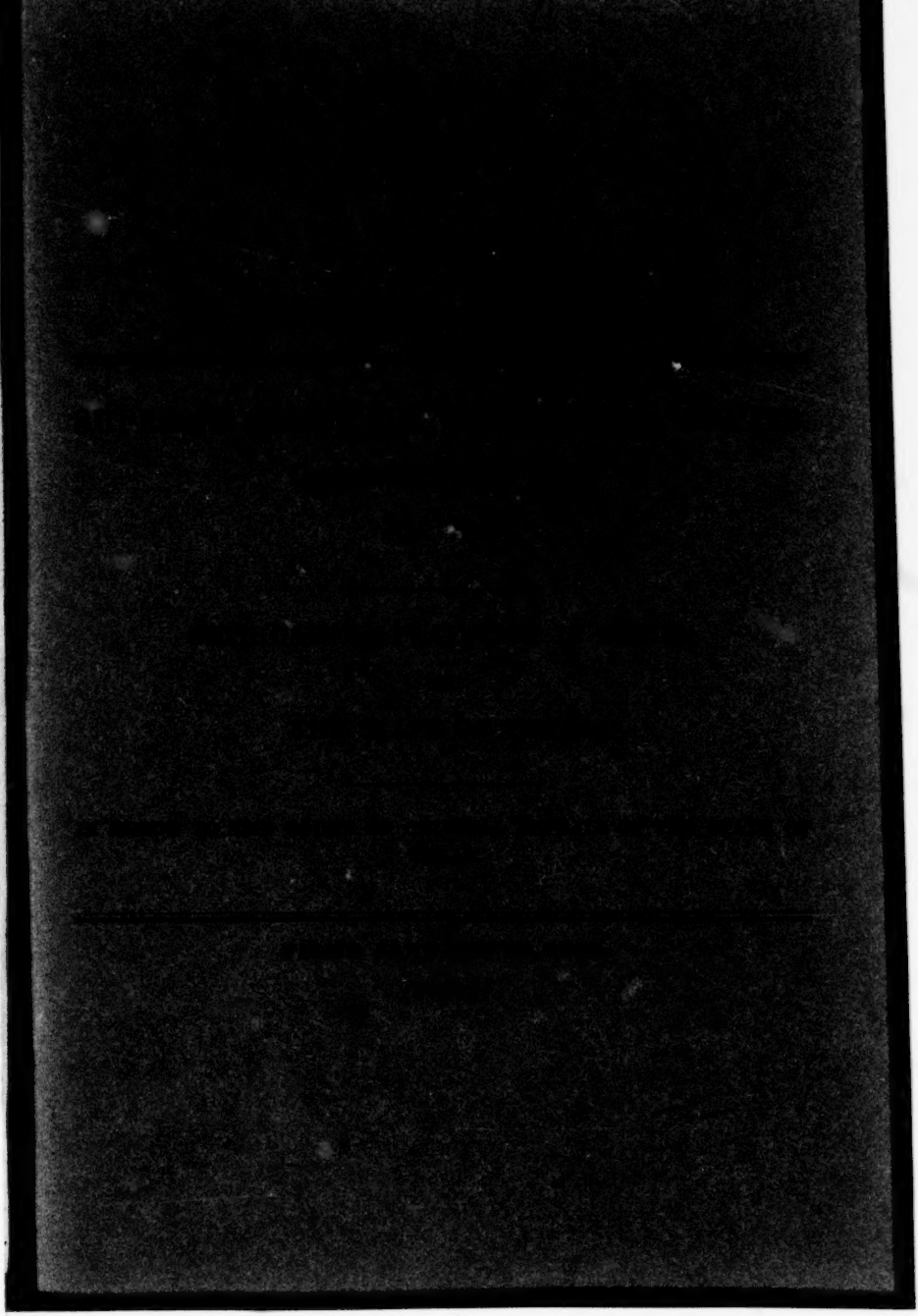

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 193.

SETH CARTER, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

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1 Be it remembered that at a term of the honorable court of criminal appeals of the State of Texas begun and holden at Tyler, Texas, on the third day of October, A. D. 1898, and which adjourned on the twenty-second day of December, A. D. 1898—present, Hon. J. M. Hurt, presiding judge, and Judges W. L. Davidson and J. N. Henderson—in the cause of

SETH CARTER, APPELLANT,
vs.
THE STATE OF TEXAS, APPELLEE. } No. 1831. Galveston County—

the following proceedings were had, to wit:

Transcript from criminal district court of Harris County. Filed April 25th, 1898.

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Caption.

THE STATE OF TEXAS,
County of Galveston:

At a term of the criminal district court begun and holden within and for the county of Galveston, at Galveston, on the 7th day of March, A. D. 1898, and which adjourned on the first day of April, A. D. 1898,

the Hon. E. D. Cavin, judge thereof, presiding, the following cause came on for trial, to wit:

THE STATE OF TEXAS
vs.
SETH CARTER. } No. 11876.

3 *Presentation of indictment.—November 26, 1897.*

[From the minutes of November 26th, 1897.]

This day came into open court, in a body, the grand jury, a quorum thereof being present, and through their foreman delivered to the judge of this court the following indictment, which was thereupon ordered by the court to be filed, to wit:

THE STATE OF TEXAS
vs.
SETH CARTER. } No. 11876.

Indictment.—Filed November 26, 1897.

In the name and by the authority of the State of Texas: The grand jurors, duly and legally selected, tried, impaneled, sworn, and charged, in the criminal district court of the county of Galveston and State of Texas, at the November term thereof, in the year of our Lord one thousand eight hundred and ninety-seven, to inquire in and for the body of said county and State, upon their oaths in said court present:

That Seth Carter, late of the county aforesaid, on the twenty-fourth day of the month of November, in the year of our Lord one thousand eight hundred and ninety-seven, in the said county of Galveston, in the State of Texas, with force and arms, then and there with express malice aforethought, did kill and murder Bertha Brantley by then and there shooting the said Bertha Brantley with a pistol, against the peace and dignity of the State.

GUS LEWY,
Foreman of the Grand Jury.

Filed November 26, 1897. C. J. Allen, clerk of the criminal district court, Galveston County, Texas.

4 *Order for special venire.—March 7, 1898.*

THE STATE OF TEXAS
vs.
SETH CARTER. } No. 11876. Indicted for murder.

This day came on to be heard the motion of the State for a special venire herein, and the same having been heard and considered by the court, the said motion is granted, and it is ordered by the court that the clerk do forthwith issue a writ commanding the sheriff of this, Galveston, county to summon the 150 persons whose names appear on the list to be attached to said writ, to be and appear before the criminal district

court of said Galveston County, now in session at the court-house of said county, on the 17th day of March, A. D. 1898, at 10 o'clock a. m., which said time is set for the trial of this cause, then and there to serve as jurors in the trial of said cause, which said writ shall be returnable on the 15th day of March, A. D. 1898, at 10 o'clock a. m.

Defendant's motion to quash indictment.—Filed March 17, 1898.

THE STATE OF TEXAS,
Galveston County:

STATE OF TEXAS *vs.* SETH CARTER. } No. 11876. In the criminal district court. March term, 1898.

And now comes the said defendant, in his own proper person, and moves the court to set aside and quash the indictment herein against him, because the jury commissioners appointed to select the grand jury which found and presented said indictment selected no person or person' of color or of African descent, known as negroes, to serve on said grand jury, but, on the contrary, did exclude from the list of persons to serve as such grand jurors all colored persons or persons of African descent, known as negroes, because of their race and color, and that said grand jury were composed exclusively of persons of the white race, while all persons of the colored race, or persons of African descent, known as negroes, although consisting of and constituting about one-fourth of the population and of the registered voters in said city and county of Galveston, and, although otherwise qualified to serve as such grand jurors, were excluded therefrom on the ground of their race and color, and have been so excluded from serving on any jury in said criminal district court for a great many years, which is a discrimination against the defendant, since he is a person of color and of African descent, known as a negro, and that such discrimination is a denial to him of the equal protection of the laws and of his civil rights guaranteed by the Constitution and laws of the United States. All of which the defendant is ready to verify.

SETH CARTER.

Sworn to and subscribed before me this 13th day of Jan., 1898.
[SEAL.]
FLORENCE T. ATKINS,
Notary Public, Galveston County, Texas.

Filed March 17, 1898. C. J. Allen, clerk of the criminal district court, Galveston County, Texas.

Order overruling motion to quash indictment.—Filed March 17, 1898.

THE STATE OF TEXAS *vs.* SETH CARTER. } No. 11876. Indicted for murder.

This day this cause was called, and the State appeared by her district attorney and the defendant, Seth Carter, appeared in person, his counsel

also being present, and then came on to be heard the defendant's motion to quash and set aside the indictment herein; and the same having been heard by the court, it is considered, ordered, and adjudged by the
6 said court that the said motion be, and the same is, in all things overruled, to which ruling of the court the defendant, Seth Carter, in open court excepted.

Arraignment of defendant, March 17, 1898.

THE STATE OF TEXAS } No. 11876. Indicted for murder.
vs.
SETH CARTER.

This day Seth Carter, the defendant, and his counsel being present in open court, and the district attorney also being present in court, and it appearing to the court that said defendant had been duly served with a copy of the indictment herein at least two entire days prior to the present day, the court proceeded to cause the said defendant, Seth Carter, to be arraigned herein in due form of law, to wit, the name of the said defendant, as stated in the indictment herein, was distinctly called, and thereupon the indictment herein was read to the said defendant, and he was asked whether he was guilty or not as therein charged, and the said defendant answered in person that he was not guilty, and his said plea of not guilty as charged in said indictment is here now entered of record upon the minutes of this court.

Plea of defendant, verdict, and judgment, March 18, 1898.

THE STATE OF TEXAS } No. 11876. Indicted for murder.
vs.
SETH CARTER.

Upon the 17th day of March, A. D. 1898, this cause was called for trial, and the State appeared by her district attorney and the defendant, Seth Carter, appeared in person, his counsel also being present, and
7 the said defendant, Seth Carter, having been duly arraigned, and having pleaded not guilty to the indictment herein, both parties announced ready for trial, and thereupon a jury—to wit, James Moore and eleven others—was duly selected, impaneled, and sworn, who having heard the indictment read and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the court, retired on the 18th day of March, A. D. 1898, in charge of the proper officer, to consider of their verdict, and afterward—to wit, on the said 18th day of March, A. D. 1898—were brought into open court by the proper officer, the defendant and his counsel being present, and being asked if they had agreed upon a verdict, answered that they had and returned to the court a verdict, which was read aloud by the clerk and is as follows: "We, the jury, find the defendant, Seth Carter, guilty of murder in the first degree & assess his punishment at death. James Moore, foreman." And thereupon the defendant asked that the jury be polled, and the name of each juror was then separately called, and each juror, as his name was called, was asked if the said verdict was his verdict, and each of said jurors answered in the affirmative. Whereupon the

said verdict was received by the court and is here now entered upon the minutes of the court as follows: "We, the jury, find the defendant, Seth Carter, guilty of murder in the first degree & assess his punishment at death. James Moore, foreman."

It is therefore considered and adjudged by the court that the defendant, Seth Carter, is guilty of murder in the first degree as found by the jury, and that he be punished as has been determined by the jury—that is, with death—and that he be remanded to jail to await the further order of this court herein.

Statement of facts.—Filed April 11, 1898.

THE STATE OF TEXAS } No. 11876. In the criminal district court,
vs. } Galveston County, Texas. March term,
SETH CARTER. } 1898.

8 Be it remembered that upon the trial of the above entitled and numbered cause in said court, at said term, the following were substantially all the material facts introduced in evidence, to wit:

DENNIS BRANTLEY, a witness for the State, being duly sworn, testified as follows:

I knew Bertha Brantley; she was my wife; she is dead. The defendant, Seth Carter, shot and killed her about November 24, 1897. I saw her after she was shot. She never spoke, but died almost instantly. He shot her with a pistol five times. It happened at the house of Sallie Maguire, No. 1722 Ave. N½, in the city and county of Galveston, Texas. The deceased and I had been out bicycle riding that afternoon, and had just come in; and it was about half past nine or ten o'clock at night when Seth Carter came to the house. There was a party going on at the house at that time, and a great many guests were at the house. My wife and I were sitting on the bed when Seth Carter came to the back door and stated to my wife that he wanted to see her on private business. She replied he could see her right there. He then came and sat alongside of her on the bed, and again said he wanted to see her on private business. I then got up and left the room, and while I was going down the stairs, looking back at them, and before I reached the bottom step, I heard the pistol shots and saw my wife fall into the kitchen door and saw Carter standing over her shooting her. She was dead when I got to her. Witness was then shown a drawing, which he testified he made, and which he proceeded to explain to the jury.

(The drawing referred to is attached to this statement of facts and marked for identification "Exhibit A," and is certified by the clerk as the original drawing introduced in evidence, and is hereby referred to and made a part of this statement of facts.)

Referring to said drawing, the witness Brantley testified that the cut or drawing marked No. 1 is a correct drawing of Sallie McGuire's house, in which the killing was done; that there were two rooms in the L portion of the house, one of which was next to the main part of the house,
9 and was a bedroom, and the other in the end of the L, and was a kitchen; that there was a door in the partition between the kitchen and the bedroom; that there was a gallery along a portion of the

L screened by latticework as shown in the cut No. 1; that steps led up to this gallery and through a door in the lattice as shown in said cut; that it was in this bedroom that the killing was done, the deceased falling when shot into the kitchen through the door in the partition; that the cut or drawing marked No. 2 correctly represented the interior of the bedroom and the positions of deceased, witness, and defendant at the moment defendant came to the door of said room between it and the kitchen and told deceased that he wanted to see her privately; that the cut or drawing marked No. 3 correctly represents the interior of said bedroom and the position of the witness, deceased, defendant, and the witness Lizzie Browning at the moment the witness Brantley was leaving the room through the door opening into the kitchen in order to afford defendant an opportunity for a private interview with deceased; that he passed on out through the kitchen and emerged on the back gallery and started on down the back steps shown in cut No. 1, and while still on the steps he heard the shots, and looking back through the door opening on the back gallery saw deceased fall into the kitchen through the door between the bedroom and the kitchen; that said drawing is correct in all its parts, and that he (Brantley) made it. Said drawing was introduced in evidence in connection with the testimony of the witness Brantley.

Cross-examined:

I had been divorced from the deceased. I was rooming at the house of the Maguire woman, 1722 Ave. N. ½, and had been living there about a month prior to the killing. I had never been bicycle riding with her before, except the time I taught her to ride before we separated. My wife told me that Carter had seen her at the house that same evening before he came to the back steps and asked to talk with her. After I went out I could not hear what was said by them; what they said was spoken too low for me to hear it. I knew there were five shots fired, but I did not examine the body to see if they all entered the deceased. I did not go down in the yard after I left the room from Carter and my wife. I did not testify before the coroner at the inquest that I had been down in the yard and was coming back and going up the steps when the shot was fired, and that I was afraid to go right in for fear that Carter would shoot me. I knew he had threatened me. There was a hat found there after Carter left; it was his hat; the officer took it away with him. Carter had been paying his respects to my wife. Yes, my wife sued me for the divorce, and I signed a waiver or consent for her to have it. We had been separated about seven or eight months before the killing, but had about made up to remarry. Sallie Maguire, at whose house the killing occurred, was the cousin of deceased. Though I had been separated from deceased for seven or eight months at the time she was killed, we had been divorced only about 10 days or so before she was killed.

Sallie Maguire, a witness for the State, testified:

It was at my house where the killing of Bertha Brantley occurred. There was a party at my house that night, November 24, 1897. While Bertha and her husband were out riding (bicycle riding) Carter, the defendant, came to my house with two banjos; one he left for Harry Lee, and the other he said belonged to his employer, Mr. Bush, and that he

was going to carry it home. He remarked that he was not coming back to the party, as he did not feel good. My husband insisted on his coming back and having a nice time. About ten o'clock that night he came back and went into the room where Bertha and her husband were sitting on the bed. He stood at the door, and said, "Bertie, I want to speak to you." And she replied, "You can speak to me right here." He then came and sat alongside of her and her husband on the bed. He then said, "I can not talk to you before all these people." Thereupon Brantley left the room, and, at Carter's request, I locked the door leading in the front room, and went on in the kitchen, cooking my cake. The door between the room they were in and the kitchen was left open, and I could see all that happened, and I could see all that happened in that room.

11 Carter and Bertha talked awhile, but I could not understand what was said, as they talked very low. And in a little while Bertha came and stood up in the door leading out of the kitchen into the room which they occupied, and we began laughing and talking in the best of humor. All of a sudden I saw a flash and heard a report which sounded to me like a firecracker, and thought at first it was Seth pranking or playing with a firecracker. Then I saw Bertha fall to the floor, and saw Seth come up to her, and, standing over her, shoot four times more. While Carter was shooting her I said to him, "Please don't shoot Bertie any more;" but he said nothing, and rolled his eyes at me.

Cross-examined:

I did not hear any cross words between Bertha and the defendant. I was surprised and very much frightened when I saw that Seth had shot Bertha. I did not see which way Seth went out. His hat was left beside Bertha on the floor, and was taken away by the officer. At the time of the shooting, and shortly before, Elizabeth Browning, the sister of Bertha, was the only person in the room with them. When Bertha came to the kitchen door to talk to me, she left Seth sitting on the bed. Yes, I testified before the coroner, and then I did say that when I spoke to Seth and asked him not to shoot Bertha any more, that he paid no attention to me. No, I did not examine the body to see how many balls had struck her. Seth's pistol was afterwards found in my yard with all the chambers empty; it was a five-shooter. Deceased was my cousin.

ELIZABETH BROWNING, a witness for the State, testified:

The deceased was my sister. I had gone to a party at Mrs. Maguire's house, arriving there a little before ten o'clock at night. As I was going through the hall on the back gallery, I heard someone calling me from the yard. I asked who it was, and the reply was "Seth." I then went to where he was, and he went on to tell me that it was just as he thought; that Bertha had been out bicycle riding with Brantley, and he told me when she came to keep her there till he came; that he would be back in a few minutes, as he had to take Mr. Bush's guitar home. I

12 replied to him that I could not keep her if she did not want to stay. Shortly afterwards he returned and called me. I went to him, and my sister had come back, and he called her also, and they stood on the back gallery and talked, and I went back in the house. Shortly afterwards Bertha left him and came back in the room and sat on the bed alongside of her husband, Dennis Brantley. Carter called

me again, and asked me where Bertha was. I told him he knew she was in the house, and he told me to tell her to come there, as he had not finished talking with her. I went back to him and told him that Bertha was talking with her husband, and I did not think it was right to call her away to talk to him. He then said, "I will go myself," and went in the room where Bertha and Brantley were. When he got in, he said, "Say, Bertha, I would like to speak to you a minute." She replied, "You can speak to me here." He asked her to step outside, as he could not tell her what he wanted to say there before all those people. Brantley then got up and left the room. I then went in the front room where the guests were assembled, but in a few minutes came around by way of the back gallery into the kitchen, and Carter called me and asked me if I thought it was right the way Bertha was treating him. My answer was that I had nothing to do with it. He then said to Bertha that if she was going home he would see her as far as the front gate. She said she felt as though she was already at home in her cousin's house. She then got up from alongside of him and walked to the door between the room and the kitchen and leaned against the door jamb, talking and running on with Sallie Maguire, who was cooking in the kitchen. Carter then said to me, "Oh, Lizzie, call her back; I have not got through telling her what I had to tell her." He then asked me to make her talk to him. I replied that I could not if she did not want to. He then leaned back on the bed and put his hand to his head, and said, "Oh, I can't stand it," and again requested me to make her talk to him. I was standing behind my sister at that time, and Seth Carter jumped up from the bed on which he was sitting and stepped between us, shoved me back, and put the pistol to my sister's head and
13 fired, and I saw my sister sink to the floor. While she was falling, he shot her again, and then stood over her and shot three times more. Seth then left. My sister never spoke after falling, and died in a few minutes. When the defendant shot deceased, her back was to him. She was standing in the door facing into the kitchen, and he was in the bedroom at the first shot.

Cross-examined:

Carter never quarreled with my sister. We were all in a pleasant humor. Carter asked me several times to make my sister talk to him, and for three times he put his hand to his head, and said, "Oh, my God! I can't stand this." Carter's hat was found lying on the floor beside my sister, and was taken away by the officer. He did not order my sister to go home, but told her if she was going home he would go as far as the gate with her. Carter has been going with my sister ever since she and her husband separated. I know she put in for a divorce from her husband, but I did not know what had been done about it. She never went with any other person, nor did he go with any one but her. I had not heard that they were engaged to be married. I knew nothing of their private affairs. I know Carter was a frequent visitor to our house, and my sister seemed to care a great deal for him. The letters here shown me are my sister's handwriting. I do know that the defendant gave deceased the money to pay for getting a divorce from Brantley, but I did not know at the time she was killed that the divorce had been obtained.

Here the State rested.

The defendant then introduced MARTHA SCHWING, who testified:

I was well acquainted with the deceased in her lifetime. She lived with her mother in the same house with me. They occupied one side and I the other, and we had lived that way for about a year before her death. The defendant, Seth Carter, was a frequent visitor to the house, and he and Miss Bertha seemed very much devoted to each other. On Monday, just three days prior to the day she was killed, Carter was at the house with a beautiful bouquet of flowers, and they went out
14 to the grave-yard, and he and Bertha placed them on the grave of her baby. He was always courteous and pleasing in his manners and address, and they were always the most loving of couples. I never saw him go with any other lady, nor did I ever see her in the company of any other gentleman after she and her husband separated. About three weeks before the killing Carter came to the house some four or five times, and each time he said he was looking for Bertha, and was acting and looking so strange and different from his conduct on previous occasions that I said to him, "Seth, you must be crazy." I was under the impression from the way he was acting that he was making a fool of himself about a woman. I never did hear them quarrel or use even a cross word to each other.

CHARLEY CALDWELL, a witness for the defendant, testified:

I live in Houston, Texas, and am the proprietor of the Nelson House. About the first of November or the last of October the defendant came to my house with a lady and registered as man and wife, and they occupied the relations of husband and wife while at my house. They seemed very affectionate, and went out and came in together about as all other newly married couples do.

TINA FRANKLIN, a witness for the defendant, testified:

I am the defendant's aunt, and live in Houston, Texas. Along about the first part of November, 1897, I was very much surprised one day to see Seth Carter come up to my house in Houston with a young lady, whom I took to be his wife, until he introduced her to me as Miss Albertha Browning. They took dinner with me, and told me that they were stopping at the Nelson House, in the city of Houston. They were very affectionate to each other and told that they were soon to be married after they returned to Galveston. Seth looked at the lots in our settlement and said he liked the neighborhood, and asked my husband to get the price of the adjoining lots to us, as he wanted to buy on his return, after they were married; they returned to their hotel in the after-
15 noon of the same day, but Seth did not seem the same and acted strange, and looked like something was the matter. Two days after that he came back to my house, and seemed greatly distressed, and wanted to borrow some money, and said his clothes were all in pawn, and he wanted money enough to get back to Galveston to get money to redeem them. The lady he said had already gone back to Galveston. I let him have a couple of dollars, and sure enough he came back on the following Sunday from Galveston and got his clothes out of pawn.

Cross-examined:

He seemed to understand what he was doing, and he did not look natural to me like he always did before.

CHARLEY SCHAPER, a witness for the defendant, testified:

I know the defendant; he used to work for my brother, and we all lived together, and I got a chance to see him a great deal while he was in my brother's employ. He was always peaceable and quiet and polite and obedient in his conduct, and I never saw him speak harsh or to do a cruel or an unkind act to any person or anything while I knew him; I do not know anything of his general reputation.

THOMAS GOGGAN, a witness for the defendant, testified:

The defendant was in my employ for some months, and a better behaved colored man I never knew. He was always genial and polite and willing about his work, and was kind and tender even to my stock, which were in his care. I know his reputation in this community for peace or violence, and it is extraordinarily good. When he left my employ I hated to let him out, and recommended him to Mr. Fellman, where he found employment as a night watchman. I saw him a few weeks before the killing. He came to my store to collect the balance due on his wages and talked to me about his new job with Mr. Fellman and said he liked it and was going to hold on to it; but I noticed there was a change in him and there was not his usual frank expression, and he appeared dejected and clouded or troubled. It was so apparent that I marked it at the time,
and not more than two days after that he left his job with Mr.
16 Fellman, all of a sudden, and went off, leaving his clothes and
things in my yard, where he slept, and not explaining to me or his employer why or where he was going. He had always been that kind of a boy that he would not leave a place without letting his employer know he was going to leave. From his appearance and his conduct shortly before the killing I was under the impression when I saw the defendant that he acted differently from what I had ever seen him do before.

AUGUST BUSH, a witness for the defendant, testified:

The defendant was in my employ as hostler at the time he killed the deceased, and had been working for me about a week. He had his room over the stable, and lived in my yard. He was always kind and attentive to my stock, and I never saw him do a cruel deed or an unkind act to anything or anybody while I knew him. He was always a very good boy. He was moving his things from his mother's to his room in my yard the evening of the killing.

L. FELLMAN, a witness for the defendant, testified:

The defendant was in my employ shortly before this killing as night watchman, having been recommended to me by Mr. Goggan. He was getting along all right, giving entire satisfaction, when all of a sudden, after three days' service, he was missing, did not return to his work, and I could not tell what was the matter. He had all my keys to my store in his possession, but they were brought me by a little boy. After a week or so Carter came back to my store and said he had been suddenly called to Houston on account of the sickness of some relative of his.

HATTIE SMITH, a witness for the defendant, testified:

The accused used to be my company before he commenced to go with Bertha. She stopped him from going with me before she quit her husband. She also attacked me several times on the street and told me she did not want to hear of my going with Seth any more, as he was her fellow. Seth was always quiet and nice while he went with me. I never knew him to fuss or quarrel with anyone; his disposition was always mild and kind and gentle.

17 MRS. SALVADORE, a witness for the defendant, testified:

I have known the defendant all his life, and know that he was, even from a small child, of the kindest and mildest disposition. I never saw him act brutally or speak unkindly to anyone in his life. He helped his mother and staid around her and was very different from most boys in his steady habits and mannerly conduct. His reputation for peace or violence is first class; everybody gives him a good name, and I never heard of his having trouble with anybody before. His mother and I used to live in the same house for a great many years. He is not more than 23 or 24 years old.

ISABELLA MITCHELL, a witness for the defendant, testified:

I am the defendant's mother. When he was a boy I struck him over the head one day with a billet of stove wood in anger, and hurt him about his head, or affected his head; always after that he has complained of his head, and most of the sickness he has ever had was in his head. He was a boy that never drank whiskey or used tobacco, and was always a very good boy and never was in any trouble before this. He would always bring his wages home to me until he commenced to go with this Alberta Brantley woman. A couple of weeks before the killing, while my son was working for Mr. Fellman, he came home one day and seemed to be in a great deal of trouble; so much so that he had the jerks and could not be still. His condition troubled me so that I called him in the room and wanted to make him a toddy, but he refused to drink it, and I then tried to get him to kneel with me in prayer; but he would not do so, but stood and looked at me and was jerking his arms all the time. He then told me he was going away and was never coming back any more. I asked him where he was going, but he said he did not know. Before he left he gave me Mr. Fellman's keys and told me to send them to him, and I told him wherever he went to put God in front of him and try and be a good boy. And before I could say more he ran out of the house, telling us we would never see him again, without taking
18 any of his clothes with him. I was of the opinion from his actions and conduct and appearances that he was insane, and ran out after him to look for him, but he was gone. I then went to the house where Bertha lived, thinking he was there, but he was not there. The reason I went to her house was because I knew if my child had gone crazy she was the cause of it, as he never stayed away from me until after he commenced to go with her. The next day I went down to his room in Mr. Goggan's yard and brought his clothes home, and found he had not been there. He was gone about two weeks, and when he came

home he said he had been to Houston. He had not been back quite two weeks before he got into this trouble. He was working for Mr. Bush at the time, and that same evening he was moving his things from my house to his room at Mr. Bush's, where he had a room. I did not see him any more till about ten or eleven o'clock the night of the killing, when I was awakened by some one coming in my room, blowing hard, whom I found to be Seth. I asked him what was the matter, and he acted just as he had acted before when he went off so strangely a few weeks before. He seemed to have the jerks and was tearing at his clothes and blowing, so that I became very much frightened and begged him to tell me what was the trouble. I asked him if he was in any trouble, and he said, "Never mind, you will hear to-morrow," and at this he ran out of the house, out in the dark, bareheaded, and I never saw him any more until I saw him at the hospital the next day. He was under a guard out there, and had his throat cut. I found out from the papers and other persons that he had killed Bertha that night and cut his own throat. From his actions and conduct and appearance the night he was at my house and ran out bareheaded and said I would hear to-morrow, I was again of the opinion that he was insane.

Cross-examined:

The reason I did not swear out papers to have him restrained for lunacy was because I did not have time; he ran out of my house so unbeknown to me, and I did not know where he had gone, or that I would see him again. When he came back he appeared to be all right
19 again. I did not know that he was jealous of Bertha. I knew they went together, and was under the impression that they were to be married. He seemed to be in his right mind when I saw him at the hospital.

SAM WILLIAMS, a witness for the defendant, testified:

That I am the brother of the defendant. He owns a pistol. He bought it when he went to work for Mr. Fellman. He had to be on watch all night, and he said he thought he ought to have a pistol for his protection. He never owned one before that, and I never saw him with one until then.

Sergeant PITHER was called by the defendant, and testified:

I am a police officer, and am the night sergeant. The hat handed me with a bullet hole entering the front brim and passing out through the top of it is the same hat which I found on the night of the killing, on the floor by the side of the dead woman. The powder burn on the brim is not so fresh now as it was then. I had the hat taken to the police office; it belonged to the prisoner. When I got a message about the killing I hurried out to the house, and found the woman dead and the prisoner gone, and in about 15 or 20 minutes I returned to the police station and found the prisoner there lying on the floor with his throat cut and covered with blood. He was bareheaded. He stated that he shot at himself and missed and tried to kill himself. He was under the impression that he was going to die, and said he wanted to die. When I was taking him to the hospital he begged me to get the doctors not to

do anything for him, as he wanted to die. He said at the police station that he was satisfied to die, as he knew he had killed the woman because he saw the whites of her eyes. He told me that he was justified in killing her, and that certain letters from her to him would prove it, and directed me where to go and get the letters, and told me where he had thrown the pistol; and, following his directions, I went and found the pistol and the letters where he told me I would find them.

Cross-examined:

He seemed to be perfectly rational and understood what he was doing, from his actions and conversation. I believed him sane at that time.

Officer BEUG was called by the defendant, and testified:

I am a police officer, and was acting night clerk at the police station the night of the killing. A message came into the office that a woman was killed out on 17th and N½, and the patrol wagon was ordered out there. In about 15 or 20 minutes afterwards, while I was also in the office, the door of the station slow*ing* opened and the prisoner walked in, bareheaded, with his throat cut, and covered with blood. He could not speak at that time, and motioned me to give him paper and writing material, which I did, and he stood at the desk and wrote this paper, which is yet smeared with blood, to wit:

"I have been going with a girl for 2 years she I kill myself and my girl girl, she put she prove me false a a party I been going with 2 years got my letters at my house they will prove all. On L 13 & 14 Seth Carter get my letters on L 13 & 14 my cousin know where they are in the drawer some where I will tell you all if I can live love brought me as long as I got moe paper an pen lov torn in darkness shadows to wipe away the tears tears get paper an pen I work for bush 19 & M North West corner."

While he was writing he fainted and was about to fall, but I caught him and laid him down on the floor, where he was lying when the night s*a*rgeant and the newspaper reporter came in. When I laid him down I could see into the wound in his neck, and it was an awful gash, and I could see the windpipe. I thought he was going to die. After he lay on the floor a while he gained strength and was able to talk to the reporter and the s*a*rgeant. I recognized this hat with a bullet hole through the front rim and coming out at the top as the hat that was brought in the office that night from the scene of the killing by one of the officers. The powder burn was fresh on it then and there seemed to be more of it on it then than now. I heard the prisoner tell the reporter that he shot the woman four times, and shot the last shot at himself and missed.

Cross-examined:

He seemed to be rational, and I was of the opinion that he was sane.

BLANCHIE LEWIS, a witness for the defendant, testified:

The defendant is my cousin. The letters showed me are the letters he gave me and asked me to put away with his picture. He left them with me at the time he said he was going away never to return. I gave them

to the chief of police after Seth was arrested. I saw Seth the day of the killing while he was moving his things to Mr. Bush's, where he was working, and he told me to take good care of his letters and picture, and said he and Bertha were going to be married the next week and that he had bought the furniture. While he was working for Mr. Fellman, about three weeks before the killing, he came to his grandmother's house, where I live, to tell us all good-bye, and said he was going away to St. Louis and was never coming back any more. He seemed to be in great distress and was jumping and jerking so that I was afraid of him. I ran out of the house and would not let him get near me. He was always easy and kind in his disposition. I was of the opinion that he was losing his mind by being crazy in love with Bertha.

Cross-examined:

I did not know that he was jealous of Bertha and Brantley. She had been divorced from Brantley. She never went with anybody but Seth and Seth went with no one but her. I never heard him say that there was any trouble between him and Bertie.

The defendant introduced a part of the testimony of Dennis Brantley before the coroner, showing that he then testified that he went down in the yard after leaving the room from the defendant and his wife, and was coming back when he heard the pistol fire, and that he was afraid to rush in, as he was afraid Carter would shoot him.

22 The defendant then introduced in evidence the following certified copy of the decree of the district court of Galveston county:

ALBERTHA BRANTLEY
vs.
DENNIS BRANTLEY. } No. 19087. November 12, 1897.

On this day came on to be heard the above-entitled and numbered cause, and thereupon came the plaintiff in person and by attorney and announced ready for trial, and the defendant files herein his written waiver of service and makes no further defence to this suit, and no jury being demanded and the matters in controversy, as well of fact as of law, being submitted to the court, and the pleadings, evidence, and argument of counsel having been heard and fully understood, and the court now fully advised in the premises, it is considered, adjudged, and decreed by the court that the decree of divorce as prayed for by the plaintiff be granted; that the bonds of matrimony heretofore existing between the plaintiff, Albertha R. Brantley, and the defendant, Dennis Brantley, be forever dissolved; that plaintiff's name be changed to Albertha Ruth Browning, and that all costs in and about this case incurred be adjudged against the said plaintiff, for which execution may issue.

THE STATE OF TEXAS,
County of Galveston:

I, Alex. Easton, clerk of the district court in and for Galveston county, hereby certify that the foregoing is true and correct copy of a decree of divorce entered by the district court of said county on the 12th day of November, A. D. 1897, in cause No. 19087, Albertha R. Brantley vs.

Dennis Brantley, as is of record in my office in minute book No. 27, on page No. 8.

Witness my official seal and signature at office in Galveston this 15th day of January, A. D. 1898.

[SEAL.] ALEX. EASTON, *Clk. D. C. G. Co.*
By EDWIN BRUCE, *Dy. Clk.*

23 The defendant also read the following letters to the jury:

[No. One.]

GALVESTON, TEXAS, *May 21st, 1897.*

Mr. SETH CARTER:

MY DEAREST BOY: I was so al/armed and enthused over the way you acted this morning that I was compelled to write you this afternoon, asking you to please tell me your full mea'ing of these *c*llusions of your letter, concerning the way a woman will flirt with a man and make him think she is so true, and cares for no one but him, and when his back is turned, it is something else; and again, this morning your conversation was about on the same subject. Tell me, Seth, has anyone been telling you any false of me, or do you know of anything I have been doing? Or does you feel tired of me and don't want to tell me, and think you will try and find some faults, if there isn't any; if so, darling boy, I would rather have you tell me at once than have me thinking over it, and can't see what is the trouble. I suppose I ask you to do too much or too many favors for me. Now, dear, if you are tired of me, or think I ask too many favors, why, be frank enough to tel' me. I know you or anyone else can not say anything but what is right of me. I know and the Lord knows that I am innocent of anything that is wrong. Now, Seth, don't think hard of me, for I am only asking to get an understanding about your actions and conversation, for I feel very down hearted and can't rest conten*d*ed until I am enlightened into this heart breaking secret. Now, if I have asked for something impossible for you to accomplish or something you don't care to do, why, please inform me. Read these lines and believe them true: Oh, vain regret the days depart, and day by day the faithful heart that loves you still is full of pain, for days that will not come again. Oh, fond and fi'kle, false and fair, do you recall the days that were, and think of these without a thrill of pain for one who love you still and can not change? Answer this letter immediately and tell me all. I hope you will allow me to see you once
24 more. Now, bye-bye-bye, darling, I am a broken hearted girl.

ALBERTHA RUTH BROWNING.

P. S.—Don't think hard, I only want to know your meaning.

[No. Two.]

GALVESTON, TEXAS, *June 10th, 1897.*

Mr. SETH CARTER:

MY DEAR: I am now writing to you to inform you of my trouble. Seth, what do you think? We lost our baby Monday night, the 7th; and oh, dear, it seems as though my heart is almost broke. Just to think

of leaving my darling baby laying in the graveyard; it seems as that is *that is* the wrong place for my baby, and if you had heard her talk Monday night, oh, Seth you could not have helped shedding tears; she did talk so sweet and sense. Why, you would have been surprised. I would like to see you to-night, so please come to the house about 8 o'clock please, without delay. I have been waiting to let you know of the death of the baby ever since she died, but I was so heart broken I could not compose my mind to writing, so I hope you won't notice that, deer, but come to-night. Look over all mistakes and bad writing, as I am not feeling very well, as I have lost the only baby I had on earth, and she was as cute and had so much sense. Now, bye-bye. I am, yours,

A. R. BROWNING.

P. S.—Answer or come at once, if you please.

[No. Three.]

GALVESTON, TEXAS, *August 11th, 1897.*

Mr. SETH CARTER.

MY DEAR DEVOTED DARLING: I am now writing this missive in response to yours of the 9th inst. Dear, I was absolutely very proud to hear from the one that has my heart, and very much overjoyed to learn you were better. Seth, you know I am always proud to receive a letter if it isn't but a few words. It cheers my heart to think you are still thinking of me enough to consume the le'sure time to write to me; so dear, never think I don't enjoy a short letter from you. Oh, I wish I could be with thee forever, and never part till death shall lay its cold, icy hands upon us, and then I hope that each of us shall be prepared, that we may meet again. Seth, I only hope that every word of love you relate to me is true. I saw in your letter where you should say I was the dearest and onliest girl in this life for you, and I sincerely hope every word is true, as I know my heart would be very much enthused, or, in other words, aroused and terrified to have spent my days of love with you and then found that there are others in the world for you. Darling, it is you that lay on the tender chords of my heart, and oh, to be deceived. Why it would cares and impress my mind very much, and may drive my heart to final ruin. I only hope we are as one, love, and hope this love of ours shall be made as plain as the day and night. To turn away from thee I have no desires, and hope we shall live more than of old. If I be treasured dearer than thine, one life I shall ask you, be kind and affectionate, for with this shall I ever and ever be yours if accepted. Now read this with care and think of it, every word. No pleasure is comparable to the standing on the vantage ground of truth. For truth has such a face and such a mien, as to be loved needs only to be seen. Great is truth, and mighty above all things. Truth is the highest thing that men can keep. A mighty pain to love it is, and 'tis a pain that pain to miss; but of all pain the greatest pain it is to love, and love in vain. Let me not to the marriage of true minds admit impediments. Love is not love which alters when it alteration finds. Just think how much dearer a wife is than a bride. Then come kiss me, sweet and twenty. Oh love, oh fire, once you draw, with one long

kiss, my whole soul through my lips as such drinketh dew; a long, long kiss, a kiss of youth and love. Let the world glide, let the world go; a fig for care, a fig for woe; if I can pay, why, I can owe, and death makes equal the high and the low. Care to our coffin adds a nail, no doubt, and every grain so merry draws one out. So like one that doth on a loathsome road doth walk in fear and dread, and, having once turned round, walk on, and turn no more your head, because you know a frightful fi'nd doth close behind your tread. So idly and so coldly heard, yet all that poets sing and grief hath known of hopes laid waste knells in that word alone. Hush my dear, lie still and slumber; holy angels guard thy bed; heavenly blessings with' number gently falling on thy head. With this I shall close, as I have a severe headache. Darling, in reading take all mistakes for kisses. Now bye-bye, dear.

26

Respectfully, yours,

ALBERTHA R. BROWNING.

[No. Four.]

GALVESTON, TEXAS, *Aug. 26th, 1897.*

Mr. SETH CARTER.

MY DEAR LITTLE PAPA: I am now writing to you to inform you of my present health, and that is this: I am very well at this time and hope this will find you the same, if not better. Darlin', I can not express my disappointed feelings over not seeing you to-night, for I felt sure I would see you to-night that I prepared for it. I have something to show you and to give you, so be sure to come to-morrow night—that is, Friday night—and bring your new hat with you. Seth, act as if you don't know anything about the hat mark before mama. I will tell you why. Darling, how did you rest with the mosquitoes last night? They were very bad out here. Seth, the lawyer says he wants $5 to enter the suit in court, so come and tell me what to tell him. Darling, I only hope this suit was over and everything had changed. Dear, I guess you will think this letter very cold, as there is no poetry in it and there isn't much love about it; but I am so tired and sleepy that I am not able to think of any love poems. But read this and think of me. Dear, you say you love me. Dear, I hope such love is true. For when the world shall turn against me I shall depend on thee. And in this world of grief and pain we should never meet again, Oh, may we meet beyond the sky, where friendship blooms and never dies. So don't think of what we were speaking of any more, please. Darling, take all mistakes and bad writing for kisses, and be sure to obey my request to-morrow.

27

Excuse short letter, dear. This is folded with a wish. Now bye-bye, darling.

I am yours, I trust,

ALBERTHA R. BROWNING.

[No. Five.]

GALVESTON, TEXAS, *Sept. 21st, 1897.*

Mr. S. CARTER.

MY ONLY DARLIN': I hope this will find you feeling better than last I saw you. I heard you were in town last night, and I hope it is

not too soon. Dear, I heard of trouble at the house, and I began wondering if you were better. I told Blanche about your illness, and she says son is not in town, and says she told you he was going away the last time she saw you, but says she will tell your grandmother about your being ill. The flower you find in the letter is a token of love, so I hope you will receive it and treasure it with a careful, loving feeling, and as you inhale the sweet perfume just think how sweet it is to be love'. When can you come up, dear? Write and tell me all of the late news. I shall close, darling, with 10,000 kisses to you. Now bye-bye.

From a true girl,

A. R. BROWNING.

[No. Six.]

GALVESTON, TEXAS, *Oct. 11th, 1897.*

Oh, Seth, I am so sorry you came to the house to see me and was refused. But I begged so hard that mama went to call you and you had gone, and I have been hurt ever since. Darling, don't think hard of me about your being disappointed; but mama thought I didn't want you to see me in bed, so please come up to-night, and bring me some *pairs* and oranges, please, for I want some awful bad, and come without fail to-night. Seth, take all bad writing and mistakes as kisses, as I am l*a*ying down writing this short missive. Now bye-bye, dear.

I am, as ever, yours, A. R. BROWNING.

Here the defendant rested.

The State then introduced ELIZABETH BROWNING, who testi-
28 fied*fied:*

My sister was generally known by the name of Bertha Brantley at the time of her death. She was so known and called by all the people who knew her. I did not even know she was divorced.

Cross-examined:

By the letters shown me I see that she signed her name Browning in some of them and in others Brantley. Browning was her name before she was married. I know she put in for her divorce, but don't know that she ever got it. Here is one letter bearing date after the decree of divorce, in which she signed her name Albertha Brantley; it is addressed to defendant. Up to her death she was generally and commonly known by her acquaintances as Bertha Brantley, and was so called by them.

Mr. ARTHUR KEETCH, a witness for the State, testified:

I was reporter for the Galveston News at the time this killing occurred. I am now a practicing attorney. I went out to the scene of the tragedy, and saw the dead woman, and came back to the police station with the sergeant, and found the defendant lying on the floor in the office with his throat cut, as it appeared fatally, and covered with blood. It was a g'astly sight. A doctor was hurriedly summoned who dressed his wounds and recommended that he be taken to the hospital as soon as possible. Carter was perfectly conscious, but was under the impression that he was about to die. In gasping and disjointed sentences he made the following statement to me: "My letters from her will prove all. My cousin has them—will give them to you. I intended to kill myself. I put four

bullets in her and then I shot at myself, but missed. I have been going with her for three years. She was the cause of it all. She came after me all the time. I would have never bothered her. She went to Houston with me about three weeks ago and staid at the Nelson Hotel with me. I shot her because she proved me false." He seemed to be perfectly rational, and from his actions and conversation I was of the opinion that he was sane.

Cross-examined:

I am unable to say whether he was sane or not at the time he
29 did the shooting. He appeared to me to be serious in saying that he wanted to die. I saw the hat which has the bullet hole in it. I saw the pistol used by the defendant on that occasion; it was a five-shooter, and all of the chambers had been discharged.

The State here rested its case.

The parties having failed to agree to a statement of the facts in the above entitled and numbered cause, and having submitted to me their respective statement, I have, from my own knowledge and the aid of said statements, made out the foregoing statement, which I certify to be a correct statement of all the facts proved upon the trial of said cause, and I here now sign the same and order it to be filed by the clerk as a part of the record in this cause.

Witness my signature, at Galveston, Texas, this 11th day of April, A. D. 1898.

E. D. CAVIN,
Judge of the Criminal District Court of Galveston County.

Filed April 11, 1898. C. J. Allen, clerk criminal district court, Galveston County, Texas.

(Here follows diagram marked p. 30.)

31 I hereby certify that the attached and foregoing paper is the original drawing introduced in evidence by the State upon the trial of cause number 11876, entitled The State of Texas vs. Seth Carter, at the March, 1898, term of the criminal district court of Galveston County, and which drawing is referred to in the testimony of the State's witness, Dennis Brantley, which appears in the statement of facts of said cause.

Witness my signature and the seal of said court, at Galveston, Texas, this the 11th day of April, A. D. 1898.

[SEAL.] C. J. ALLEN,
Clerk of the Criminal District Court of Galveston County.

The charge of the court.—Filed March 18, 1898.

THE STATE OF TEXAS
vs.
SETH CARTER. } No. 11876. Instructions to the jury.

By the law of this State every person with a sound memory and discretion who shall unlawfully kill any reasonable creature in being within this State with malice aforethought, either express or implied, shall be deemed guilty of murder. Murder committed with express malice

aforethought is of the first degree, and murder committed with implied malice aforethought is of the second degree.

Malice aforethought means the intentional and voluntary doing of a wrongful and unlawful act by a person of sound memory and discretion, with the intent, means, and ability to accomplish the reasonable, natural, and probable consequences of such act, and in a manner showing a heart regardless of social duty and fatally bent on mischief.

Express malice aforethought exists when the evidence shows beyond a reasonable doubt, by the facts and circumstances in evi-
32 dence, transpiring either before, at the time of, or after a killing, that the slayer acted with a sedate, deliberate mind and the formed design unlawfully to kill the person slain; and express malice must be proved by the evidence to the satisfaction of the jury beyond a reasonable doubt.

Implied malice aforethought is that which the law infers from or imputes to certain acts; thus, where the fact of an un'awful killing has been established by the evidence and there are no facts nor circumstances in evidence which tend to establish the existence of express malice nor to mitigate, excuse, or justify the act, then the law implies malice and the killing would be murder of the second degree.

If malice aforethought be fully conceived and formed in the mind, it is not material for what length of time it has existed.

If you believe from the evidence, beyond a reasonable doubt, that about the time and at the place stated in the indictment the defendant, Seth Carter, acting with express malice aforethought—that is to say, with a sedate, deliberate mind and the formed design unlawfully to kill Bertha Brantley—did unlawfully kill said Bertha Brantley by shooting her with a pistol, then find said defendant guilty of murder in the first degree, and assess his punishment by death or by confinement in the State penitentiary for life.

If the evidence does not satisfy you beyond a reasonable doubt that the defendant acted with express malice aforethought—that is to say, with a sedate, deliberate mind and the formed design unlawfully to kill Bertha Brantley—then he can not be convicted of murder in the first degree, and in such case you will acquit him of that offense; but if you do believe from the evidence, beyond a reasonable doubt, that, about the time and at the place stated in the indictment, the defendant, Seth Carter, acting with implied malice aforethought, as that expression has been hereinbefore defined and explained, did unlawfully kill Bertha Brantley by shooting her with a pistol, then find said defendant
33 guilty of murder in the second degree, and assess his punishment by confinement in the State penitentiary for any length of time not less than five years.

If the true name of the deceased at the time of her death was Albertha Ruth Browning, yet if she was then commonly and generally known by the name of Bertha Brantley, then the allegation in the indictment that her name was Bertha Brantley is correct and sufficient, and if the evidence satisfies you beyond a reasonable doubt that she was so commonly and generally known by the name of Bertha Brantley, then said allegation is sufficiently sustained by the proof.

Among other defenses made in this case is that of insanity. You are instructed that no person can be punished for any act done in a state of

insanity. Every person is presumed to be sane until the contrary appears to the jury trying him. He is presumed to entertain, until the contrary so appears, a sufficient degree of reason to be responsible for his acts; and to establish a defense on the ground of insanity it must be clearly proved that, at the time of committing the act, the person accused was, for the time being, laboring under such defect of reason from disease of the mind that he did not know what he was doing, or that he did not know the difference between the right and wrong as to the particular act charged against him. The insanity must have existed at the very time of the commission of the offense, and the mind must have been, for the time being, so dethroned of reason as to deprive the person accused of a knowledge of the right and wrong as to the particular act done. You are to determine from the evidence in this case the matter of insanity, it being a question of fact, controlled, so far as the law is concerned, by the instructions given to you in charge, and if you acquit the defendant on the ground of insanity you will so state in your verdict.

The defendant is presumed to be innocent until his guilt is established by the evidence to your satisfaction, beyond a reasonable doubt, and unless the evidence in this case so satisfies you that he is guilty
34 of murder in the first degree, or of murder in the second degree, then find him not guilty.

You are the exclusive judges of the credibility of the witnesses and the weight of the evidence, and by your conclusions thereon, guided by the law as given you in charge, you will determine your verdict, which, whatever it may be, must not be the result of chance, accident, or lot, but of reason, deliberation, and judgment, applied to the facts and circumstances in evidence, guided by the law as given you in charge.

E. D. CAVIN, *Judge.*

Filed March 18, 1898. C. J. Allen, clerk of the criminal district court, Galveston County, Texas.

Defendant's requested charge.—Given.—Filed March 18, 1898.

THE STATE OF TEXAS } Instructions No. One asked on the part of the
vs. } defendant.
SETH CARTER. }

The court instructs the jury that it devolves upon the State to prove every material issue of fact in this case, beyond a reasonable doubt, except the issue of the defendant's sanity or insanity, at the time of committing the crime charged, and upon that issue the burden of proof is upon the defendant to satisfy you that he was affected with insanity and by reason thereof did not know the difference between right and wrong as to the particular act charged against him at the time he shot and killed the deceased, before you would be authorized to acquit him.

WILFORD H. SMITH,
Att'y for Seth Carter.

Given:

E. D. CAVIN, *Judge.*

Filed March 18, 1898. C. J. Allen, clerk of the criminal district court, Galveston County, Texas.

35 *Refused charges.—Filed March 18, 1898.*

INSTRUCTIONS NO. TWO ASKED ON THE PART OF THE DEFENDANT.

The court further instructs the jury that if they believe from the evidence that at the time the defendant shot and killed the deceased he was not of sound mind, but was affected with insanity, and such affection was the efficient cause of the act, and that he would not have done so but for that affection, or if they believe that at the time the prisoner had not sufficient use of his reason to control the emotions which prompted him, they should acquit him on the ground of insanity.

WILFORD H. SMITH,
Att'y for Seth Carter.

Refused:

E. D. CAVIN, *Judge.*

Filed March 18, 1898. C. J. Allen, clerk criminal district court, Galveston County, Texas.

INSTRUCTIONS NO. THREE ASKED ON THE PART OF THE DEFENDANT.

The jury are instructed that they may take into consideration the evidence of the prisoner's previous good character, also the circumstances of whether he really intended to take his own life at the time he shot and killed the deceased, in connection with all the other facts and circumstances, for the purpose of enabling them to determine the mental condition of the prisoner at that time.

WILFORD H. SMITH,
Att'y for Seth Carter.

Refused:

E. D. CAVIN, *Judge.*

Filed March 18, 1898. C. J. Allen, clerk of the criminal district court, Galveston County, Texas.

36 *Bill of exceptions No. One.—Filed March 30, 1898.*

THE STATE OF TEXAS } No. 11876. In the criminal district court, Galveston County, Texas. March term, A. D. 1898.
vs.
SETH CARTER.

Be it remembered that on the 17th day of March, 1898, the above entitled and numbered cause was called for trial, and the defendant, in open court, before he was arraigned, and before pleading to the indictment, presented and read to the court the following motion to quash the said indictment, to wit:

And now comes the said defendant, in his own proper person, and moves the court to set aside and quash the indictment herein against him, because the jury commissioners appointed to select the grand jury which found and presented said indictment selected no person or person of color, or of African descent, known as negroes, to serve on said grand jury; but, on the contrary, did exclude from the list of persons to serve as

such grand jurors all colored persons or person of African descent, known as negroes, because of their race and color, and that said grand jury were composed exclusively of persons of the white race, while all persons of the colored race or persons of African descent, known as negroes, although consisting of and constituting about one-fourth of the population and of the registered voters in said city and county of Galveston, and although otherwise qualified to serve as such grand jurors, were excluded therefrom on the ground of their race and color, and have been so excluded from serving on any jury in said criminal district court for a great many years, which is a discrimination against the defendant, since he is a person of color and of African descent, known as a negro; and that such discrimination is a denial to him of the equal protection of the laws and of his civil rights guaranteed by the Constitution and laws of the United States. All of which the defendant is ready to verify.

SETH CARTER.

Sworn to and subscribed before me this 13th day of January,
37 1898.

[SEAL.] FLORENCE T. ATKINS,
Notary Public in and for Galveston County, Texas.

After reading the said motion, the defendant asked leave of the court to introduce witnesses, and offered to introduce witnesses to prove and sustain the allegations therein made, but the court refused to hear any evidence in support of the said motion, and thereupon overruled the same without investigating into the truth or falsity of the allegations of said motion; to which action of the court the defendant then and there excepted, and tenders this his first bill of exceptions, and asks that the same be signed and filed as a part of the record in this case.

WILFORD H. SMITH,
Atty. for Seth Carter.

The foregoing bill of exceptions is approved, allowed, and ordered to be filed by the clerk as a part of the record in this cause, this 30th day of March, 1898.

E. D. CAVIN,
Judge of the Criminal District Court of Galveston County, Texas.

Filed March 30, 1898. C. J. Allen, clerk criminal district court, Galveston County, Texas.

Bill of exceptions, No. two.—Filed March 30, 1898.

THE STATE OF TEXAS *vs.* SETH CARTER. } No. 11876. In the criminal district court, Galveston County, Texas, March term, A. D. 1898.

Be it remembered that on the 17th day of March, 1898, at the trial of the above-entitled case, after the jury had been selected, duly accepted by both parties, empaneled, and sworn according to law to try said cause, but before the introduction of any evidence in the case, the defendant

presented and read to the court the following motion to quash the
38 the panel of petit jurors selected to try said case, to wit:

And now comes the said defendant in his own proper person and moves the court to set aside and quash the panel of petit jurors selected and summoned to try him in the case herein, because the jury commissioners appointed to select the list of petit jurors from which the present panel were drawn selected no persons of color or of African descent, known as negroes, so that they might be drawn on said panel, but that said jury commissioners excluded from the list of persons selected to serve as petit jurors for this term of this court all persons of color or of African descent, known as negroes, because of their race and color, and that said panel, as well as the list of jurors selected for the entire term of this court, is composed exclusively of persons of the white race, while all persons of the colored race or persons of African descent, known as negroes, although constituting about one-fourth of the population and of the registered voters in said city and county, and although otherwise qualified to serve as jurors, were excluded therefrom on the ground of their race and color, and that they have been so excluded from serving on any jury in this court for a great many years, which is a discrimination against the defendant, since he is a person of color and of African descent, known as a negro, and that such discrimination is a denial to him of the equal protection of the laws and of his civil rights, guaranteed by the Constitution and laws of the United States. All of which the defendant is ready to verify.

SETH CARTER.

Sworn to and subscribed before me this 13th day of January, 1898.

FLORENCE T. ATKINS,
Notary Public in and for Galveston County, Tex.

After reading the said motion, the defendant asked leave of the court to introduce witnesses, and offered to introduce witnesses to prove and sustain the allegations therein made; but the court refused to hear any evidence in support of the said motion, and thereupon overruled
39 the same without investigating the truth or falsity of the allegations of the said motion; to which action of the court the defendant then and there excepted, and tenders this his second bill of exceptions, and asks that the same be signed and filed as a part of the record in this case.

WILFORD H. SMITH,
Att'y for Seth Carter.

The foregoing bill of exceptions is approved, allowed, and ordered to be filed as a part of the record in this cause, this 30th day of March, 1898.

E. D. CAVIN,
Judge of the Criminal District Court of Galveston County, Texas.

Filed March 30, 1898. C. J. Allen, clerk criminal district court, Galveston County, Texas.

Bill of exceptions No. three.—Filed March 30, 1898.

THE STATE OF TEXAS vs. SETH CARTER. } No. 11876. In the criminal district court, Galveston County, Texas. March term, A. D. 1898.

Be it remembered that on the 17th day of March, 1898, during the trial of the above entitled and numbered cause, the State introduced in evidence, in connection with the testimony of the witness Dennis Brantley, a drawing made by the witness Dennis Brantley, which drawing will be found included in the statement of facts, and which can not otherwise be made a part of this bill of exceptions, and said drawing as it appears in said statement of facts is hereby referred to and made a part of this bill, which was objected to by the defendant at the time it was offered upon the following grounds, to wit: "That said drawing was made by an interested person and was not correct, and the court overruled said objections and admitted said drawing, and the same was inspected by the jury in connection with the testimony of said witness Brantley, to which action of the court the defendant then and there excepted.

The defendant tenders this his third bill of exceptions, and asks that the same be signed and filed as a part of the record in this cause.

WILFORD H. SMITH,
Atty. for Seth Carter.

The foregoing bill of exceptions is approved, allowed, and ordered to be filed by the clerk as a part of the record in this cause, this 30th day of March, 1898.

E. D. CAVIN,
Judge of the Criminal District Court, Galveston County, Texas.

Filed March 30, 1898. C. J. Allen, clerk criminal district court, Galveston County, Texas.

Bill of exceptions No. four.—Filed March 30, 1898.

THE STATE OF TEXAS vs. SETH CARTER. } No. 11876. In the criminal district court of Galveston County, Texas. March term, A. D. 1898.

Be it remembered that upon the trial of the above entitled and numbered cause the defendant presented to the court the following written instructions, to wit:

"Instruction No. 2, asked on the part of the defendant: The court further instructs the jury that if they believe from the evidence that at the time the defendant shot and killed the deceased he was not of sound mind, but was affected with insanity, and such affection was the efficient cause of the act, and that he would not have done so but for that affection, or if they believe that at the time the prisoner had not sufficient use of his reason to control the emotions which prompted him, they should acquit him on the ground of insanity.

"WILFORD H. SMITH,
"*Attorney for Seth Carter.*

"Instruction No. 3, asked on the part of the defendant: The
41 jury are instructed that they may take into consideration the evidence of the previous good character of the prisoner, also the circumstance of whether he really intended to take his own life at the time he shot and killed the deceased, in connection with all the other facts and circumstances, for the purpose of enabling them to determine the mental condition of the prisoner at that time.

"WILFORD H. SMITH,
"*Attorney for Seth Carter.*"

And asked the court that the same be given to the jury, which the court refused to do, and the defendant then and there excepted to the decision of the court refusing to give said instructions and tenders this his fourth bill of exceptions and asks that the same be signed and filed as a part of the record in this case.

WILFORD H. SMITH,
Attorney for Seth Carter.

The foregoing bill of exceptions is approved, allowed, and ordered to be filed by the clerk as a part of the record in this cause this 30th day of March, 1898.

E. D. CAVIN,
Judge of the Criminal District Court, Galveston County, Texas.

Filed March 30, 1898. C. J. Allen, clerk criminal district court, Galveston County, Texas.

Bill of exceptions No. six.—Filed March 30, 1898.

THE STATE OF TEXAS } No. 11876. In the criminal district court,
vs. } Galveston County, Texas. March term,
SETH CARTER. } A. D. 1898.

Be it remembered that upon the trial of the above entitled and numbered cause the State introduced the following testimony, to wit: Elizabeth Browning, a witness for the State called in rebuttal, testified that deceased was her sister, and that at the time of her death deceased was commonly and generally known by the name of Bertha Brantley,
42 and was called by that name by all the people who knew her; which testimony was objected to by the defendant at the time it was offered upon the following grounds, to wit: That the solemn records of the district court of Galveston County showed that the deceased, by a decree of that court, had her name changed to Albertha Ruth Browning on the 12th day of November, 1897, and it was not proper to dispute the record evidence in that manner; and the court overruled said objections and admitted the said testimony, to which ruling of the court the defendant then and there excepted, and tenders this his sixth bill of exceptions and asks that the same be signed and filed as a part of the record in this cause.

WILFORD H. SMITH,
Att'y for Seth Carter.

The foregoing bill of exceptions is approved, allowed, and ordered to be filed by the clerk as a part of the record in this cause this 30th day of March, 1898.

E. D. CAVIN,
Judge of the Criminal District Court of Galveston Co., Texas.

Filed March 30, 1898. C. J. Allen, clerk criminal district court, Galveston County, Texas.

Defendant's motion for new trial.—Filed March 19, 1898.

THE STATE OF TEXAS,
Galveston County.

THE STATE OF TEXAS } No. 11876. In the criminal district court.
vs. March term, 1898.
SETH CARTER.

And now comes the said defendant, who has been convicted in said court and whose punishment has been assessed at death by the jury, on the 18th day of March, 1898, and moves the court to set aside and vacate said judgment of conviction, and grant him a new trial herein for the following reasons and causes, to wit:

43 First. Because the court erred in refusing to permit the defendant to introduce evidence in support of the allegations made in his motion to quash the indictment in said case, and in overruling the said motion without an investigation of the matters of fact therein alleged.

Second. Because the court erred in refusing to permit the defendant to introduce evidence in support of the allegations made in his motion to quash the panel of petit jurors empaneled to try said case, and in overruling said motion without an investigation of the matters of fact therein alleged.

Third. Because the court erred in permitting a drawing to be shown to the jury by the district attorney, which was made by one of the prosecuting witnesses, and purported to show the situation of all the immediate parties and their movements at the time, connected with the tragedy of the killing. Said picture was not photographed, but was painted and made afterwards, and undertook to describe scenes and situations which the witness never saw.

Fourth. Because the court erred in permitting the district attorney to introduce evidence over the objections of the defendant, to the effect that the deceased went by or was called by the name of Albertha Brantley after the defendant had shown the decree of the district court of Galveston County, Texas, changing her name to Albertha Ruth Browning on the 12th day of November, 1897.

Fifth. Because the court erred in refusing the second special charge asked by the defendant, and by not including in the main charge the principles of law invoked in said special charge.

Sixth. Because the court erred in refusing the third special charge asked by the defendant, and by not including in the main charge the principles of law invoked in said special charge.

Seventh. Because the court erred in not explaining to the jury the law of temporary insanity, and drawing a distinction between
44 temporary and permanent insanity, when requested to do so by the defendant.

Eighth. Because the verdict of the jury was contrary to the law and the evidence in this: That the evidence of the defendant's mother was undisputed, nor was the evidence of the witness Martha Schwing and the witness Blanchie Lewis, all to the effect that shortly before the killing the defendant acted so strangely and unusual to them that they believed him insane, and that on the night after the tragedy his mother and the witness Blanchie Lewis testified that he was so violent and wild in his actions that they were afraid of him. The previous good character for peace and kindness, and the evidence of his employe's that he was even tender and careful to the stock in his charge, together with the evidence that there was no quarrel or angry words passed between the deceased and the defendant on the night of the killing, but that he devotedly loved her, and that deceased had just gotten up from his side and was laughing and talking with her cousin when the defendant shot her, and the further undisputed fact that the defendant fired one shot at himself, which passed through the top of his hat, knocking it off, and the further fact that he afterwards attempts to kill himself by cutting his throat, and with his throat cut, and believing he was about to die, goes to the police station, bleeding and bareheaded to make his dying statement, all shows that the defendant was under the influence of temporary insanity at the time he shot the deceased, and should not have been convicted.

Ninth. Because the verdict was contrary to the law and the evidence in this: That there was no evidence of or circumstances shown which tended to establish the existence of express malice of the defendant towards the deceased, without which there can be no murder in the first degree.

Tenth. Because the court in its written charge to the jury failed to charge all the law applicable to and demanded by the facts in evidence in this: That the evidence fairly raised the issue whether or not the defendant was devotedly in love with the deceased, and desired her company and wished to further converse with her, and whether or not
45 on being refused and coldly repulsed by her and treated with utter indifference by her, whether or not such cold and repulsive treatment from her, whom he loved devotedly, was not more than the defendant could stand, and had the effect to destroy his reason for the time being, making a case of temporary insanity caused by heart bereavement and disappointed love, which should have been submitted to the jury and an explanation given between temporary insanity from the above cause and permanent insanity caused by a disease of the mind.

WILFORD H. SMITH,
Att'y for Seth Carter.

Filed March 19, 1898. C. J. Allen, clerk criminal district court, Galveston County, Texas.

Order overruling motion for new trial.—Notice of appeal.—Order granting ten days after adjournment of court to file statement of facts.—March 30, 1898.

THE STATE OF TEXAS, *vs.* SETH CARTER. } No. 11876. Indicted for murder.

This day came on to be heard the motion of the defendant, Seth Carter, to set aside the verdict and judgment herein rendered, and grant him a new trial of this cause, and the State being present in court by her district attorney, and the defendant, Seth Carter, being present in court in person, his counsel also being present, and the court having heard the said motion, is of the opinion that the same should be refused. It is therefore considered, ordered, and adjudged by the court that the said motion for a new trial herein be and the same is refused and in all things overruled, to which ruling of the court the defendant, Seth Carter, excepted and in open court gave notice of an appeal herein to the court of criminal appeals of the State of Texas, which said notice is here now entered of record. Ten days after the adjournment of the present
46 term of this court are allowed the parties to prepare and file a statement of facts in this case.

Motion in arrest of judgment.—Filed March 19, 1898.

THE STATE OF TEXAS,
Galveston County.

THE STATE OF TEXAS, *vs.* SETH CARTER. } No. 11876. In the criminal district court, March term, 1898.

And now comes the said defendant, who has been convicted in said court of murder in the first degree, and his punishment assessed at death, and moves the court in arrest of the said judgment, and says, that the same is illegal and void for the reason, as follows, to wit:

That there was a fatal variance between the allegations in the indictment and the proof as to the name of the deceased, the indictment charging her name to be Bertha Brantley, and the proof being that she had been married to one Brantley, by whose name she went, until the 12th day of November, 1897, when by a decree of divorce in the district court of Galveston County, Texas, her name was changed to Albertha Ruth Browning.

WILFORD H. SMITH,
Att'y for the Defendant.

Filed March 19, 1898. C. J. Allen, clerk criminal district court, Galveston County, Texas.

Order overruling motion in arrest of judgment.—March 19, 1898.

THE STATE OF TEXAS, vs. SETH CARTER. } No. 11876. Indicted for murder.

47 This day came on to be heard the motion of the defendant, Seth Carter, to arrest the judgment herein on a former day of this term rendered against him, and the State being present in court by her district attorney, and the defendant, Seth Carter, being present in court in person, his counsel also being present, and the court having heard the said motion, is of the opinion that the same should be refused. It is therefore considered, ordered, and adjudged by the court that the said motion in arrest of the judgment herein be and the same is refused and in all things overruled, to which ruling of the court the defendant, Seth Carter, in open court excepted.

Assignment of errors.—Filed April 13th, 1898.

THE STATE OF TEXAS, vs. SETH CARTER. } No. 11876. In the criminal district court, Galveston County, Texas, March term, A. D. 1898.

And now comes the defendant in the above styled and numbered cause and assigns the following errors in the rulings and proceedings of said criminal district court, as appears of record in said cause, for the consideration of the court of criminal appeals of the State of Texas, to which this case is now appealed, to wit:

First assignment of error. Because the court erred in refusing to permit the defendant to introduce evidence in support of his motions to quash the indictment and to quash the panel of petit jurors empaneled to try said cause, and in disposing of said motions without a hearing upon and an investigation of the matters of fact therein alleged.

Second assignment of error. Because the court erred in overruling the defendant's motion to quash the indictment and to quash the panel of petit jurors empaneled to try said cause, on the ground that the jury commissioners appointed to select the grand jury which found and pre-

48 sented said indictment and the jury commissioners appointed to select the list of petit jurors from which the present panel were drawn selected no person of color or of African descent, known as negroes, to serve on said grand or petit jury, but, on the contrary, did exclude therefrom all persons of color or of African descent, known as negroes, because of their race and color, and that said grand and petit juries were composed exclusively of persons of the white race, while all persons of the colored race or persons of African descent, known as negroes, although consisting of and constituting about one-fourth of the population and of the registered voters in said city and county of Galveston, and although otherwise qualified to serve as such grand and petit jurors, were excluded therefrom on the ground of their race and color, and have been so excluded from serving on any jury in said criminal district court for a great number of years, which is a discrimination against the defendant, since he is a person of color and of African descent, known as a negro,

and that such discrimination is a denial to him of the equal protection of the laws and of his civil rights guaranteed by the Constitution and laws of the United States; which motions were signed and sworn to by the defendant, and were uncontradicted by any evidence whatever.

Third assignment of error. Because the court erred in permitting the State's attorney to introduce evidence, over the defendant's objection, to the effect that the deceased was generally known by the name of Bertha Brantley, after the defendant had shown that by a decree of the district court of Galveston County, rendered on the 12th day of November, 1897, her name had been changed to Albertha Ruth Browning.

Fourth assignment of error. Because the court erred in overruling the defendant's motion in arrest of judgment, setting up that there was a fatal variance between the allegation in the indictment and the proof as to the name of the injured party, the proof being that she had been married to one Brantley, by whose name she went until the 12th day
48 of November, 1897, when by a decree of divorce in the district court of Galveston County, Texas, her name was changed to Albertha Ruth Browning.

Fifth assignment of error. The court erred in refusing to give the following second special charge requested by the defendant, and by not including in the main charge the principles of law invoked in said special charge, to wit:

"Instruction No. 2 asked on the part of the defendant. The court further instructs the jury, that if they believe from the evidence that at the time the defendant shot and killed the deceased he was not of sound mind, but was affected with insanity, and such affection was the efficient cause of the act, and that he would not have done so but for that affection; or if they believe that at the time the prisoner had not sufficient use of his reason to control the emotions which prompted him, they should acquit him on the ground of insanity."

Sixth assignment of error. The court erred in refusing to give the following third special charge requested by the defendant, and by not including in the main charge the principles of law invoked in said special charge, to wit:

"Instruction No. 3 asked on the part of the defendant. The jury are instructed that they may take into consideration the evidence of the previous good character of the prisoner; also the circumstance of whether he really intended to take his own life at the time he shot and killed the deceased, in connection with all the other facts and circumstances, for the purpose of enabling them to determine the mental condition of the prisoner at that time."

Seventh assignment of error. Because the court erred in permitting the State's attorney, over the objection of the defendant, to introduce to the jury a certain drawing shown in the statement of facts.

Eighth assignment of error. Because the court erred in failing in its written charge to charge all the law applicable to and demanded by the facts in evidence, in this: That the evidence fairly raised the issue
50 of whether or not the defendant was devotedly in love with the deceased, and desired her company and wished to converse further with her, and whether or not on being coldly repulsed by her and treated with indifference by her, such cold and indifferent treatment was

not more than the defendant could stand, and had the effect to destroy his reason for the time being, making a case of temporary insanity caused by heart bereavement and disappointed love, which should have been submitted to the jury, with an explanation of the difference between temporary insanity from such a cause and permanent insanity caused by disease of the mind.

Ninth assignment of error. Because the court erred in failing to charge all the law applicable to and demanded by the facts in evidence, in this: That the evidence raised the issue and demands a charge to the jury on the law of manslaughter.

Tenth assignment of error. Because the court erred in overruling the ninth ground of the defendant's motion for a new trial, setting up that the verdit of the jury was contrary to the law and the evidence, in this: That there was no evidence of or circumstances shown which tended to establish the existence of express malice on the part of the defendant towards the deceased, without which there can be no murder in the first degree.

WILFORD H. SMITH,
Att'y for Seth Carter.

Filed April 13, 1898. C. J. Allen, clerk criminal district court, Galveston County, Texas.

Certificate.

THE STATE OF TEXAS,
County of Galveston:

I, C. J. Allen, clerk of the criminal district court of said county, do certify that the foregoing transcript contains a true copy of all the proceedings in said above entitled and numbered cause.

51 Witness my signature and seal of office on this the 19th day of April, A. D. 1898.

[SEAL.] C. J. ALLEN,
Clerk of the Criminal District Court of Galveston County, Texas.

(Endorsed:) No. 1831; 5th assignment. Seth Carter, appellant, *vs.* The State of Texas, appellee. From Galveston County criminal district court. Filed in court of criminal appeals at Austin, Texas, April 25th, 1898. E. P. Smith, clerk. Filed in court of criminal appeals at Tyler, Texas, Sept. 8th, 1898. E. B. Wiggins, clerk.

Request to forward transcript to court of criminal appeals at Austin, Texas.—Filed April 25th, 1898.

HOUSTON, TEXAS, *April 22, 1898.*

C. J. ALLEN, Esq., *Galveston.*

DEAR SIR: Please forward transcript in case of Seth Carter *vs.* State to clerk of court of criminal appeals at Austin, the court being in session there now.

J. K. P. GILLASPIE,
Crim. Dist. Att'y.

THE STATE OF TEXAS
vs. } 11876.
SETH CARTER.

I hereby certify that the foregoing is a true and correct copy of the application made by the State to forward the transcript in the above styled and numbered cause to the Austin term of the court of criminal appeals of Texas.

52 Witness my signature and seal of office this the 23d day of April, A. D. 1898.

[SEAL.] C. J. ALLEN,
Clerk of the Criminal District Court of Galveston County, Texas.

(Endorsed:) Filed in the court of criminal appeals at Austin, Texas, April 25, 1898. E. P. Smith, clerk. Filed in court of criminal appeals at Tyler, Texas, Sept. 8, 1898. E. B. Wiggins, clerk.

Certified copy of orders from the clerk of the court of criminal appeals at Austin.—Filed Sept. 8, 1898.

Be it remembered, at a term of the honorable court of criminal appeals of the State of Texas, begun and holden at Austin on the 4th day of April, A. D. 1898 (present, Hon. J. M. Hurt, presiding judge, and Judges W. L. Davidson and John N. Henderson), in the cause of Seth Carter, appellant, *vs.* The State of Texas, appellee, No. 1502, Galveston County, the following orders were made:

"June 25th, 1898. Taken under advisement and transferred to Tyler."

Previous orders.

"May 25th, 1898. Submitted on briefs for both parties."

"June 8th, 1898. Affirmed. Opinion by Davidson, judge.

"This cause came on to be heard on the transcript of the record of the court below, and the same being inspected, because it is the opinion of this court that there was no error in the judgment, it is ordered,

53 adjudged, and decreed by the court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision is certified below for observance."

"June 22nd, 1898. Motion for rehearing submitted."

I, E. P. Smith, clerk of the court of criminal appeals of the State of Texas, at the city of Austin, hereby certify that the foregoing is a true copy of the orders made by this court in the above entitled and numbered cause.

In witness whereof I hereunto set my hand and affix the seal of said court, at Austin, this 27 day of June, A. D. 1898.

[SEAL.] E. P. SMITH, *Clerk.*

(Endorsed:) No. 1502/1831. Court of criminal appeals of the State of Texas. Seth Carter v. The State of Texas. Transferred from Austin. Copy of orders. Filed in court of criminal appeals, at Tyler, Texas, Sept. 8, 1898. E. B. Wiggins, clerk.

Opinion—Filed June 8th, 1898.

SETH CARTER, APPELLANT, vs. THE STATE OF TEXAS, APPELLEE. } No. 1831. 5th assignment. Appeal from Galveston County.

The indictment charged appellant with killing Bertha Brantley by shooting her with a pistol; he was convicted of murder in the first degree, his punishment assessed at death, and prosecutes this appeal.

54 When the case was called for trial, motion was made to quash the indictment, because the jury commissioners had not drawn persons of African descent as jurors to serve upon the grand jury. Art. 559, Code Cr. Proc., provides: "A motion to set aside an indictment or information shall be based on one or more of the following causes, and no other: 1. That it appears by the record of the court that the indictment was not found by at least nine grand jurors. * * * 2. That some person not authorized by law was present when the grand jury were deliberating upon the accusation against the defendant, or were voting upon the same." If this motion has any merit in it at all, it relates not to the substance of the indictment, but to the manner of its finding and presentment. So it will be seen by the very terms of the statute itself that the fact that people of African descent were not drawn by the commissioners to serve as jurors upon the grand jury is not a ground for setting aside an indictment. Art. 397 of the Code of Cr. Proc. provides: "Any person, before the grand jury has been impaneled, may challenge the array of jurors, or any person presented as a grand juror; and in no other way shall objections to the qualifications and legality of the grand jury be heard. Any person confined in jail in the county shall, upon his request, be brought into court to make such challenge." Appellant does not undertake to bring himself within the purview of this statute. His motion was to quash the indictment. If there were any objections to the grand jury, or any member of it, it should have been exercised by challenge, either to the array or to a particular member of said body. (See Barber v. State, decided at the present term.) The question of challenge to the array or to a particular juror is not suggested, nor is it shown that he was debarred this right. It is too late after indictment found to question the manner of impanelling a grand jury.

Motion was also made to quash the special venire, because the jury commissioners had not selected any persons of African descent to serve as jurors upon the trial of cases to be tried at the succeeding term
55 of the court after the jurors were drawn by said jury commissioners. This was urged in the nature of a challenge to the array. Art. 661 of the Code Cr. Proc. provides: "The defendant may challenge the array for the following causes only: That the officer summoning the jury has acted corruptly, and has wilfully summoned persons upon the jury known to be prejudiced against the defendant with a view to cause him to be convicted." This statute only applies when the jurors have been selected by the sheriff and not drawn by the jury commissioners, for art. 662 declares that "the two preceding articles do not apply when the jurors summoned are those who have been selected by jury commissioners. In such case no challenge to the array is allowed." This is not a

novel question in this State. As far back as the 44th Tex. Rep., it was held that where the defendant is a negro it is not a ground of challenge to the array that it is composed of white men exclusively. (Williams v. State, 44 Tex. Rep., 34.) So it has been held that it is not a ground for a motion to quash a special venire or of challenge to the array that the jury commissioners selected jurors solely from persons known to be not equals of the accused, but his superiors. (See Cavitt v. State, 15 App., 190.) There was no error on the part of the court with reference to either of the above bills of exception.

On the trial, while Dennis Brantley was upon the witness stand, the State introduced a drawing made by said witness. This drawing is a map or diagram of the house where the killing occurred, and is shown to be correct. The objection urged was that the drawing was made by an interested person, and was not correct; but the testimony shows without contradiction that it was correct. It is immaterial who made the map or diagram, whether an interested or disinterested party. If the map was not a correct one this fact could be shown, and the defendant, if he desired, could attack the map by showing its incorrectness and supply the defects by putting in evidence one of his own. So far as we are advised it has always been held proper and legitimate, for the purpose of explaining the testimony of the witness and rendering it more intelligible
56 than it would have been otherwise, to introduce diagrams, maps, and plats. It also serves the purpose of enabling the jury to better understand and apply the evidence with reference to various localities spoken of by the witnesses. This question underwent an investigation in the case of Rodriquez v. State, 32 Tex. Cr. Rep., 259; and it was there held that such maps could be properly introduced in evidence.

The State introduced the witness Elizabeth Browning, and by her proved that the deceased was her sister, and that at the time of her death she was commonly called and generally known by the name of Bertha Brantley and was called by that name by all the people who knew her. This was objected to upon the ground "that the solemn records of the district court of Galveston County showed that the deceased, by a decree of that court, had her name changed to Albertha Ruth Browning on the 12th of November, 1897, and that it was not proper to dispute the record evidence in that manner." It may be stated that the evidence does show that the deceased obtained a divorce from her husband, Dennis Brantley, and by the decree of said district court her name was changed from Brantley to Browning, her maiden name. This occurred a few days prior to the homicide. This, however, was not known by members of her own family. But this would be immaterial; if her name had been, in fact, independent of the decree of *the decree of* divorce, Albertha Ruth Browning, but she was commonly and generally known by the name of Bertha Brantley; the allegations in the indictment that such was her name would be sufficient. The unbroken line of decisions in this State are to this effect. This testimony was introduced to meet the supposed variance caused by the introduction of the decree of divorce.

Appellant requested the court to charge the jury, if they believed from the evidence that at the time the defendant shot and killed deceased he was not of sound mind, but was affected with insanity, and such affection was the efficient cause of the act and that he would not have done

so but for that affection, or if they believed that at the time the prisoner had not sufficient use of his reason to control the emotions which
57 prompted him, they should acquit on the ground of insanity. This was refused by the court. There was no error in this. The court gave a charge on insanity in language which has been often approved by this court, and, in addition, at the request of appellant, gave the following charge: "The court instructs the jury that it devolves upon the State to prove every material issue of fact in this case beyond a reasonable doubt, except the issue of the defendant's sanity or insanity at the time of committing the crime charged, and upon that issue the burden is upon the defendant to satisfy you that he was affected with insanity, and by reason thereof did not know the difference between right and wrong as to the particular act charged against him at the time he shot and killed deceased, before you will be authorized to acquit him." So the court not only gave a proper charge, but gave the above charge at the request of appellant. It was not necessary to repeat this phase of the law in further instructions.

Appellant requested the following instructions: "The jury are instructed that they may take into consideration the evidence of the prisoner's previous good character; also the circumstances of whether he really intended to take his own life at the time he shot and killed deceased, in connection with all the other facts and circumstances, for the purpose of enabling you to determine the mental condition of the prisoner at that time." As before stated, the court gave a proper charge upon the law of insanity, and instructed the jury that they were to determine from the evidence in the case this question of insanity, it being a question of fact for their determination. We do not believe that it was incumbent on the court to single out, specify, or group any particular facts, and specially call the attention of the jury to them. It is not the province of the court to sum up the facts and call special attention of the jury to the force and effect of certain facts, unless under some statute authorizing or requiring him to do so.

58 It is also contended that the verdict of the jury is contrary to the law and against the evidence. The statement of facts discloses that the deceased, Bertha Brantley, and Dennis Brantley had been husband and wife. They had been living apart for some months, and a few days prior to the homicide the deceased had obtained a divorce from her husband. It is further disclosed that the appellant had been the paramour of Bertha, the deceased, and had been very intimate with her for some two or three years prior to the homicide, and while she was still the wife of Dennis Brantley, and that they were infatuated with each other is placed beyond question by the testimony. Letters from the deceased to appellant are incorporated in the record, showing her almost absurd infatuation with him. Appellant became jealous of the deceased, and, it would seem, because of approaching remarriage of Dennis Brantley and the deceased. On the evening of the homicide there was a social gathering at one Maguire's. Dennis Brantley and the deceased attended that gathering, and while sitting upon the side of the bed in one of the rooms appellant made his appearance at the door of the room and asked for a private interview with the deceased. She requested him to approach where she and her former husband were sitting and hold the

interview with her at that place. This he declined, and insisted upon a private interview. Dennis Brantley thereupon left the room, so that appellant might have the desired interview. A low conversation occurred between appellant and deceased. She left him and approached the door of the adjoining room, the kitchen, and while standing at that point talking appellant approached her from behind and shot her in the head. She fell upon the floor and he fired three or four shots at her prostrate form, killing her. He left his hat by his victim and fled. He went thence to his mother's residence and finally appeared at the police station and surrendered to the officers. When he arrived there his throat was cut, and it was thought fatally. He admits this cutting, saying he desired to die. His hat was found with a bullet hole through it
59 from front to rear, but the ball missed his head. This ball, he says, he fired himself at the time he killed deceased. These are the salient facts, and are not questioned. We believe this evidence justified the verdict of the jury, and we deem it unnecessary to comment upon the testimony.

The judgment is affirmed.

DAVIDSON, *Judge.*

Hurt, P. J., absent.

(Endorsed:) No. 1831. 5th assignment. Seth Carter, appellant, vs. The State of Texas, appellee. Appeal from Galveston County. Affirmed. Opinion by Davidson, judge. Filed in court of criminal appeals at Austin, Texas, June 8th, 1898. E. P. Smith, clerk. Filed in court of criminal appeals at Tyler, Texas, Sept. 8, 1898. E. B. Wiggins, clerk.

Appellant's motion for rehearing.—Filed, June 18th, 1898.

SETH CARTER, APPELLANT,
vs.
THE STATE OF TEXAS, APPELLEE.

No. 1831. 5th assignment. In the court of criminal appeals of the State of Texas. April term, 1898.

And now comes the appellant herein, Seth Carter, and moves the court to set aside the judgment of affirmance, rendered and entered in this case, on the 8th day of June, 1898, wherein the death penalty was assessed against him, in the court below, and grant him a rehearing of this cause, for the following reasons, to wit:

First. This court erred in holding that the court below did not err in overruling the appellant's motions to quash the indictment and to quash the panel of petit jurors on the ground that the jury commissioners
60 appointed to select the grand jury which found and presented said indictment, and the jury commissioners appointed to select the list of petit jurors from which the present panel were drawn, selected no person of color, or of African descent, known as negroes, to serve on said grand or petit jury; but on the contrary, did exclude therefrom all persons of color, or of African descent, known as negroes, because of their race and color, and that said grand and petit juries were composed exclusively of persons of the white race, while all persons of color, or of African descent known as negroes, although consisting of and constituting about

one-fourth of the population and of the registered voters in said city and county of Galveston, and although otherwise qualified to serve as such grand and petit jurors, were excluded therefrom on the ground of their race and color, and have been so excluded from serving on any jury in said criminal district court for a great many years, which is a discrimination against the defendant, since he is a person of color and of African descent known as a negro, and that such discrimination is a denial to him of the equal protection of the laws and of his civil rights, guaranteed by the Constitution and laws of the United States, which error in the court below, was assigned by the appellant on page nine of his brief, making his second assignment of error.

Second. This court erred in holding that the court below was right in refusing to permit the appellant to introduce evidence in support of, and to prove the grounds alleged in his motions to quash the panel of petit jurors, and to quash the indictment herein above mentioned, and in disposing of the said motions without a hearing upon and an investigation of the matters of fact therein alleged, which error in the ruling of the court below was assigned by the appellant, on page ten of his brief, making his first assignment of error.

Appellant states that the name of the opposing counsel, in this cause, is Hon. Mann Trice, assistant attorney-general, Austin, Texas, and he prays that notice of this motion be served in accordance with law.

WILFORD H. SMITH,
Att'y for Seth Carter.

61 Argument under first ground of motion:

This court in their opinion discuss this question entirely from the standpoint of the State statutes, wholly ignoring the Constitution and laws of the United States and the decisions referred to in the brief of appellant.

Manifestly the question here raised is purely Federal, and the Constitution and laws of the United States and the decisions of the United States Supreme Court alone must be looked to for any proper light on the subject. The appellant relies upon the first section of the 14th amendment to the Constitution of the United States and the decisions thereunder for the protection which he claims and the rights which he holds were denied him in the trial court, all provisions of the statutes of our own State to the contrary notwithstanding.

Sec. 1, 14th Amend. Const. U. S.; sect. 4, chap. 114, vol. 1, Supplement Rev. Stat. U. S.; Neal vs. Delaware, 103 U. S., 370; Gibson vs. Miss., 162 U. S., 565.

Argument under second ground of motion:

Clearly upon the plainest principles of common sense and justice, when the trial court refused to permit the appellant to introduce his evidence in support of his motions to quash the indictment, and the panel of petit jurors, it was equivalent to, and should be held to be, an admission by the State that the allegations of said motions were true, with an admission that negroes were denied and refused the right to sit on the grand and petit juries in said criminal district court of Galveston County, Texas, because of their race and color, then clearly the provisions of the 14th amendment to the Constitution of the United States, which appel-

lant invokes, has been violated by the State of Texas through its tribunal.

Respectfully submitted.

WILFORD H. SMITH,
Atty. for Seth Carter.

62 I hereby accept service of the within motion, and agree same may be submitted.

June 18th, 1898.

MANN TRICE, *Asst. Atty. Gen'l.*

(Endorsed:) No. 1831. 5th assignment. Seth Carter, appellant, vs. The State of Texas, appellee. Motion for rehearing filed in the court of criminal appeals at Austin, Texas, June 18th, 1898. E. P. Smith, clerk. Filed in the court of criminal appeals at Tyler, Texas, Sept. 8th, 1898. E. B. Wiggins, clerk.

Order of court overruling motion for rehearing.—Wednesday, December 7th, 1898.

SETH CARTER, APPELLANT, vs. THE STATE OF TEXAS, APPELLEE. } No. 1831. 5th assignment. Appeal from Galveston County.

This day came on to be heard the motion submitted by the appellant for a rehearing in this cause, and the same, being considered by the court, is overruled.

63 *Opinion on motion for rehearing.—Filed December 7, 1898.*

SETH CARTER, APPELLANT, vs. THE STATE OF TEXAS, APPELLEE. } No. 1831. 5th assignment. Appeal from Galveston County.

Appellant was convicted of murder in the first degree, with the death penalty affixed, and prosecuted an appeal to this court. The judgment of the lower court was affirmed at the last Austin term, 1898, and now comes before us on motion for rehearing.

The points relied on in the motion for rehearing are (1) the action of the court below in overruling appellant's motion to quash the indictment on account of the method pursued in impaneling the grand jury; and (2) the refusal of the court to entertain appellant's motion to quash the panel of petit jurors selected to try the case. Both questions were presented on the submission of the case, and we decided against appellant, in accordance with the provisions of our statute. While our attention was called to the Federal Constitution on this subject, it was not discussed by us. Our attention is again called to this matter, and it is urgently insisted that the impanelment of both the grand and petit juries was in violation of that provision of the 14th amendment to the Constitution of the United States, and the Federal statutes passed in pursuance thereto, which guarantee to all persons, regardless of race, color, or previous condition of servitude, the equal protection of the laws.

We will quote so much of the bills of exception as it is contended present the Federal questions.

Bill No. 1. "Be it remembered that on the 17th day of March, 1898, the above entitled and numbered cause was called for trial, and the defendant in open court, before he was arraigned, and before pleading to the indictment, presented and read to the court the following
64 motion to quash said indictment, to wit:

"'And now comes the said defendant in his own proper person and moves the court to set aside and quash the indictment herein against him, because the jury commissioners appointed to select the grand jury which found and presented said indictment selected no person or persons of color or of African descent, known as negroes, to serve on said grand jury, but on the contrary did exclude from the list of persons to serve as such grand jurors all colored persons or persons of African descent, known as negroes, because of their race and color; and that said grand jury were composed exclusively of persons of the white race, while all persons of the colored race or persons of African descent, known as negroes, although consisting of and constituting about one-fourth of the population and of the registered voters in said city and county of Galveston, and although otherwise qualified to serve as grand jurors, were excluded therefrom on the ground of their race and color; and have been so excluded from serving on any jury in said criminal district court for a great many years, which is a discrimination against the defendant, since he is a person of color and of African descent, known as a negro, and that such discrimination is a denial to him of the equal protection of the laws, and of his civil rights, guaranteed by the Constitution and laws of the United States. All of which the defendant is ready to verify. (Signed) Seth Carter.

"'Sworn to and subscribed before me, this 13th day of January, 1898. [Seal.] Florence T. Atkins, notary public in and for Galveston County, Texas.'

"After reading the said motion, the defendant asked leave of the court to introduce witnesses and offered to introduce witnesses to prove and sustain the allegations therein made, but the court refused to hear any evidence in support of the said motion, and thereupon overruled the same, without investigating into the truth or falsity of the allegations of said motion. To which action of the court the defendant then and there excepted, and tenders this his first bill of exceptions," etc.

65 Bill No. 2. "Be it remembered that on the 17th day of March, 1898, at the trial of the above-entitled case, after the jury had been selected, duly accepted by both parties, and impaneled and sworn according to law to try said cause, but before the introduction of any evidence in the case, the defendant presented and read to the court the following motion to quash the panel of petit jurors selected to try said case, to wit:

"And now comes the said defendant, in his own proper person, and moves the court to set aside and quash the panel of petit jurors selected and summoned to try him in the case herein, because the jury commissioners appointed to select the list of petit jurors from which the present panel were drawn selected no person of color or of African descent, known as negroes, so that they might be drawn on said panel; but that said jury commissioners excluded from the list of persons selected to serve as petit jurors for this term of this court all persons of color or of

African descent, known as negroes, because of their race and color; and that said panel, as well as the list of jurors selected for the entire term of this court, is composed exclusively of persons of the white race, while all persons of the colored race or persons of African descent, known as negroes, although constituting about one-fourth of the population and of the registered voters in said city and county, and although otherwise qualified to serve as jurors, were excluded therefrom on the ground of their race and color, and that they have been so excluded from serving on any jury in this court for a great many years, which is a discrimi'ation against the defendant, since he is a person of color and of African descent, known as a negro, and that such discrimination is a denial to him of the equal protection of the laws and of his civil rights guaranteed by the Constitution and laws of the United States; all of which the defendant is ready to verify. Seth Carter.

"Sworn to and subscribed before me this 13th day of January, 1898. Florence T. Atkins, notary public in and for Galveston County."

66 "After reading the said motion, the defendant asked leave of the court to introduce witnesses, and offered to introduce witnesses, to prove and sustain the allegations therein made; but the court refused to hear any evidence in support of the said motion, and thereupon overruled the same, without investigating the truth or falsity of the allegations of the said motion; to which action of the court the defendant then and there excepted, and tenders this his second bill of exceptions," etc.

We will first discuss the questions involved in the impanelment of the grand jury. It is contended that the motion to quash the indictment on this account comes too late; that it should have been presented in a motion to challenge the array. As treated in the original opinion, we there intimated that his challenge should have been to the array and not by motion to quash. However, our statute points out the grounds of the motion to challenge the array, and it does not include the grounds here urged. The 14th amendment to the Federal Constitution and statutes passed thereunder would seem to make race discrimination in the organization of a grand jury a ground of challenge to the array, and, where practicable, we believe the question should be raised by a motion to challenge the array of jurors. But in this particular case no opportunity was afforded appellant to challenge the array, because the grand jury which returned the bill against him had been impaneled prior to the commission of this offense. He did, after his arrest under the indictment and before his arraignment, move to quash the indictment on the ground that in the organization of the grand jury colored persons were discriminated against, in that none were selected by the jury commissioners. This was his first opportunity to test this question, and was proper practice and timely under the decisions of the Supreme Court of the United States. (Neal v. Delaware, 103 U. S., 370; U. S. v. Gale, 109 U. S., 63.) We think under our statute this question should have been raised in a motion to set aside the indictment or in the form of a special plea. True, this is not one of the causes stated in our Code of Criminal Procedure (arts. 559, 561). It will be seen that the

67 enumeration of causes by the Code is not exclusive of other fundamental constitutional grounds. We quote from Williams v.

State, 20 App., 359, as follows: "There are two other pleas not specially mentioned or authorized in the Code, which are constitutional and inherent, to wit, jeopardy and want of jurisdiction, and a special issue as to these may also be raised by a special plea, independently of any provisions of the statute." This special plea is required to be verified by the affidavit of the defendant. (Code Cr. Proc., art. 562.) And so we take it that a fundamental question arising under the Constitution of the United States can be made by special plea outside of our statute.

We do not understand appellant to make the contention that the laws of this State as to the impanelment of juries discriminates between the races, or in any manner violates the provisions of the 14th amendment to the Constitution of the United States, or the laws of Congress enacted thereunder. The fact is, that our laws have made no such distinction since said 14th amendment became the law of the land. It is not necessary here to go into the details of our statute on the subject of the selection, organization, and impanelment of grand and petit juries, but a reference thereto will clearly show that the law is in perfect harmony with the Federal Constitution on this subject, excluding every idea of discrimination; and such has been the uniform holding by the courts of last resort in this State.

Appellant insists, while the law is all right, that in its administration there was a discrimination in the selection by the jury commissioners of the grand jurors who found this bill of indictment. If this be true, it is a ground for invoking the revisory powers of this court; and if we erroneously hold that there was no discrimination, it would afford the basis for a writ of error to the Supreme Court of the United States. Neal v. Delaware, 103 U. S., 370; U. S. v. Gibson, 162 U. S., 565; Williams v. Miss., 170 U. S., 213.

In the cases cited, especially in the case of Neal v. Delaware, the subject of race prejudice in regard to the impanelment of juries is
68 thoroughly discussed pro and con—a majority of the court holding that if in the administration of the law, fair on its face and presenting no discrimination between the races, it was so administered in the impanelment of the grand jury as to entirely ignore and discriminate against colored citizens qualified to sit on the grand jury, it would be violative of that provision of the 14th Amendment to the Constitution of the United States guaranteeing the equal protection of the laws to all citizens. We quote from that case as follows: "We repeat what was said in Virginia v. Rives (100 U. S., 322), 'that while a colored person put to a trial involving his life, liberty, or property, cannot claim as a matter of right that his race shall have a representation on the jury, and while a mixed jury in a particular case is not within the meaning of the Constitution always, or absolutely necessary to the equal protection of the laws, it is a right to which he is entitled that in the selection of juries to pass upon his life, liberty, or property there shall be no exclusion of his race and no discrimination against them because of their color.'" Chief Justice White and Justice Field dissented from the view entertained by a majority of the court, and the latter expressed his views in a strong dissenting opinion—taking the ground that if the grand jury was composed of legal, qualified citizens under the law, the defendant would have no

right to complain because some other legal qualified citizens were equally entitled to be impanelled; that it was the deprivation of a right of which said excluded citizens could alone complain. Whatever may be our views upon this question, so far as we are concerned, it being a Federal question, it is res adjudicata, and the decisions of the Supreme Court of the United States are the law on the subject. However, we would remark that in the cases which have come under our observation it was a controversy between the races—that is, a colored man was on trial for an injury to a person of the white race. If the injured parties in said cases were white persons and the defendants colored persons we can understand the application of the Federal decisions; but if both colored persons (as in this case) we fail to
69 appreciate how race prejudice could have entered into the administration of the law in finding the bill of indictment by an exclusively white grand jury; unless it be assumed that race prejudice on the part of the whites against the blacks is so bitter and acute as that the law would not be fairly and impartially administered where the rights of colored persons for injuring colored persons are alone in issue. Our courts have invariably recognized race prejudice where the controversy or issue on trial involved white against black persons. As illustrative of this, where a negro is on trial for the homicide of a white man, it is permissible to test the juror as to his race prejudice, and if he answer that he can not give the defendant as fair a trial as if the charge was against a white man for killing a white man, it affords a ground for challenge. Lester v. State, 2 App., 432; Cavit v. State, 15 App., 190. Perhaps the same objection would hold good in the empanelment of a grand jury.

As stated above, where the issue to be tried is exclusively between persons of the black race, we fail to perceive how race prejudice could operate on or actuate a white jury in finding a bill of indictment. The decisions of the Federal court referred to make no distinction of the character suggested, but are broad enough to cover every case where a negro is indicted by a grand jury, if it appears that in the selection of such grand jury the negro race has been discriminated against. We will therefore consider that the decisions of the Supreme Court of the United States construing the 14th amendment and the Federal enactments thereunder includes the character of case here presented; that is, an indictment of one negro for killing another negro. The bill of exceptions challenges the attention of this court, and involves the question whether or not the court below erred in refusing to quash the indictment in the shape the question was presented to it by the bill of exceptions.

It will be noticed that the motion to quash was based simply on the affidavit of appellant. There were no accompanying affidavits setting out the facts; nor was there any agreement, as in Neal's Case, supra,
70 not requiring a separate affidavit of the appellant in support of the motion; that is, the question was presented to the court without any evidence whatever in support of it. The general rule is that a motion to quash reaches only matters on the face of the record. In this case the motion to quash was not predicated on the record, but involved extraneous matters, and before the court would be authorized to act there must be some proof of the allegations contained in the motion. The

motion was but a mere tender of the issue, unaccompanied by any supporting testimony. We think, as presented, it was not sufficient to come within the rule laid down in Smith v. Miss., 163 U. S., 592. But it is said that here appellant offered to prove the allegations of his motion and the court refused to permit him. The language used in the Smith Case, supra, in the motion also contains a proffer to prove the allegations of the motion by the officers selecting the jury, and prayed for subpœnas for said officers. But the court in deciding the question ignored this offer, presumably on the ground of its insufficiency as being too vague, and, in fact, because the testimony of no witness was offered in support of the motion. The proposition contained in the motion here is still more vague and general. It names no witness or person by whom it was proposed to prove the allegations of the motion. Under the practice in our courts, and we believe under the practice of all courts, a bare proposition to prove certain facts without tendering the witness or witnesses, or stating by whom it was proposed to prove them, would not be sufficient to invoke the action of the court. And the bare recitation that the court refused to hear evidence in support of said motion is without meaning, because in fact no testimony was tendered by appellant. Possibly appellant framed his offer to prove the allegations of his motion in general terms (without naming any witness by whom the facts could be proved) for the reason that he had no witness to support such allegations. That the propositions contained in his motion are difficult of proof is conceded by the Supreme Court. (Gibson v. Miss., 162 U. S., 565, 584.) But this, instead of relieving him of the necessity of pointing out his means
71 of proof, it occurs to us would require a greater strictness in naming the witnesses by whom the allegations could be established. At any rate, the bill of exceptions on this subject should be so framed as to include all matters sufficient to overcome the presumption of the correctness of the ruling complained of. We hold, therefore, that the court did not err in refusing to quash or set aside the indictment.

As to the motion to quash the special venire, a reference to the bill of exceptions shows that this motion was not presented to the court until after the jury had been selected, duly accepted by both parties, impanelled, and sworn according to law to try said case. This motion came too late. (Gale v. U. S., 109 U. S., 65.) He had an opportunity to move to quash the panel on the grounds alleged, supporting his motion by accompanying affidavits, or tender named witnesses, when the list was brought in and before a single juror had been impaneled and sworn. But he did not avail himself of this. And it occurs to us that, after engaging in the selection of a jury, passing on their qualifications, and accepting twelve qualified jurors as fair and impartial to try his case, it was then too late, under all the rules of practice announced by the courts, to move to quash the original panel or list of jurors summoned, from whom the twelve jurors had been selected. We do not deem it necessary to do more than state the case as presented in the bill of exceptions. (See Amer. & Eng. Enc. of Law, vol. 12, p. 424, 425, and notes, for collated authorities.)

We hold that the court below did not err in overruling said motions. The motion for rehearing is accordingly overruled.

DAVIDSON, *Judge*.

(Endorsed:) No. 1831. 5th assignment. Seth Carter, appellant, vs. The State of Texas, appellee. Appeal from Galveston County. Motion for rehearing overruled. Opinion by Davidson, judge. Filed in court of criminal appeals at Tyler, Texas, December 7th, 1898. E. B. Wiggins, clerk.

72 *Petition for writ of error to the Supreme Court of the United States. Filed December 21st, 1898.*

SETH CARTER
vs.
THE STATE OF TEXAS. } No. 1831. 5th assignment.

To the Hon. Court of Criminal Appeals of the State of Texas:

The appellant herein, Seth Carter, a citizen of the State of Texas and of the United States, comes and petitions this honorable court to grant him a writ of error herein, whereby he may have his case removed, appealed, or transferred to the Supreme Court of the United States for the examination and review of the errors apparent upon the face of the record herein, in which there was an adverse decision to certain rights, privileges, and immunities claimed by him under the first section of the fourteenth amendment to the Constitution of the United States.

In the event the court should refuse to grant the writ of error, then he prays that the court may enter an order herein directing the clerk of this court to furnish this appellant with a copy of the record in this cause, so that he may be enabled to prosecute his appeal to the Supreme Court of the United States by applying to some one of the judges thereof for a writ of error herein.

Appellant presents the following grounds and reasons upon which he bases this application, to wit:

First. That the appellant is a person of color and of African descent, known as a negro, and was tried and convicted for the crime of murder, and the death penalty was assessed against him in the court below, which judgment was affirmed in this court on the 8th day of June, 1898.

73 Second. That in the court before which he was tried, no member of his race and color were allowed to sit upon the grand jury which found and presented the indictment against him, or upon the petit jury which tried and convicted him, but were excluded therefrom because of their race and color, and for no other reason, and the members of his race were excluded and had been excluded from serving on any jury in that court for a great many years, which was a violation by the State of Texas in his trial of the first section of the fourteenth amendment to the Constitution of the United States, and a denial to him of the equal protection of the laws.

Third. Because, when the appellant presented his motion to quash the indictment against him, on account of the exclusion of members of his race from the grand jury on the ground of their race and color, and also when he presented his motion to quash the panel of petit jurors for the same reason, and in both cases offered evidence to prove the allegations of said motions, the said trial court refused to permit appellant to introduce any evidence in support of said motions, but overruled the same

without any investigation or proof whatever for or against said motions, all of which appears in the record in this case.

Fourth. Because this court is the highest court of this State in criminal matters in which a decision in this case can be had, and that this court has rendered a final judgment herein, deciding adversely to the rights of the appellant claimed under the Constitution and laws of the United States.

Fifth. Because manifest injustice has been done the appellant in the record and proceedings, and in the rendition of the judgment against him, by assessing the death penalty, as well as the adverse rulings and decision affecting his rights claimed under the first section of the fourteenth amendment to the Constitution of the United States.

Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme
74 Court of the United States; and if the writ be disallowed, then for an order to the clerk of this court to furnish appellant with a copy of the record in this case, etc.

WILFORD H. SMITH,
Att'y for Seth Carter.

The writ of error prayed for is granted. The clerk of this court at Tyler, Texas, will make out and deliver to the plaintiff in error a correct transcript of the papers of the case on demand of said plaintiff in error, upon his compliance with the laws and practice governing such cases.

J. M. HURT, *P. J.*

(Endorsed:) No. 1831. 5th assignment. Seth Carter v. The State of Texas. Petition for writ of errror to Supreme Court of U. S. Filed in court of criminal appeals at Tyler, Texas, December 21st, 1898. E. B. Wiggins, clerk.

Assignment of errors.—Filed December 21st, 1898.

SETH CARTER, PLAINTIFF IN ERROR, *vs.* THE STATE OF TEXAS, DEFENDANT in error.	In the court of criminal appeal, of the State of Texas.

And now comes the said plaintiff in error, by his attorney, and makes the following assignment of error in the rulings and proceedings of the court below, upon which he relies, and expects to obtain a reversal in the Supreme Court of the United States, to wit:

First assignment of error: Because the court of criminal appeals should have reversed the case, because of the error in the trial court in overruling the defendant's motion to quash the indictment, and to quash the panel of petit jurors empaneled to try the cause. The said motions
75 being made on the ground that the jury commissioners appointed to select the list of petit jurors from which the panel was drawn which tried the plaintiff in error selected no persons of color or of African descent, known as negroes, to serve on said grand or petit jury; but, on the contrary,

did exclude therefrom all person' of color or of African descent, known as negroes, because of their race and color, and that the said grand and petit juries were composed exclusively of persons of the white race, while all persons of the colored race, or persons of African descent, known as negroes, although consisting of and constituting about one-fourth of the population and of the registered voters in said city and county of Galveston, and although otherwise qualified to serve as such grand and petit juries, were excluded therefrom on the ground of their race and color, and have been so excluded from serving on any jury in said criminal district court for a great number of years, which is a discrimination against the plaintiff in error, since he is a person of color and of African descent, known as a negro, and that such discrimination is a denial to him of the equal protection of the laws, and of his civil rights guaranteed by the Constitution and laws of the United States; to which ruling of the court the plaintiff in error duly excepted, which exception appears of record in the case.

Second assignment of error: Because the court of criminal appeals should have reversed the case because of the error in the trial court in refusing to permit the plaintiff in error to introduce evidence in support of and to prove the allegations of his motions to quash the indictment and to quash the panel of petit jurors empaneled to try said cause and in disposing of said motions without permitting an investigation of the matters of fact therein alleged; to which action of the court the plaintiff in error duly excepted, which exception appears of record in the case.

Wherefore the plaintiff in error prays that the judgment and sentence of the said trial court and of the said court of criminal appeals of
76 the State of Texas be reversed and held for naught.

WILFORD H. SMITH,
Att'y for Seth Carter, Plaintiff in Error.

(Endorsed:) No. 1831. Seth Carter, plaintiff in error, vs. The State of Texas, defendant in error. Assignment of errors. Filed in court of criminal appeals at Tyler, Texas, December 21st, 1898. E. B. Wiggins, clerk.

Certificate.

THE STATE OF TEXAS:

I, E. B. Wiggins, clerk of the court of criminal appeals of the State of Texas at Tyler, do hereby certify that the foregoing seventy-five and a fraction pages contain a true and correct copy of the proceedings had in the court of criminal appeals of the State of Texas in cause No. 1831, Seth Carter, appellant, vs. The State of Texas, appellee, from Galveston County, as the same now appear on file in my office.

In witness whereof I hereunto set my hand and affix the seal of said court at Tyler this the twenty-ninth day of December, A. D. 1898.

[SEAL.] E. B. WIGGINS,
Clerk of the Court of Criminal Appeals of the State of Texas at Tyler.

Fees of $45.00 for preparing record paid by Seth Carter, Jan'y 10, 1899.

77 UNITED STATES OF AMERICA, ss.

The President of the United States, to the honorable the judges of the court of criminal appeals of the State of Texas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of criminal appeals before you, or some of you, between Seth Carter, plaintiff in error, and the State of Texas, defendant in error, a manifest error hath happened, to the great damage of the said Seth Carter, plaintiff in error, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 30 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

[SEAL.]

C. DART,
Clerk of the Circuit Court of the United States,
for the Eastern District of Texas.

Allowed by
J. M. HUNT,
Presiding Judge of the Court of Criminal
Appeals of the State of Texas.

78 (Indorsed:) Filed in the court of criminal appeals at Tyler, Texas, December 21st, 1898. E. B. Wiggins, clerk.

79 UNITED STATES OF AMERICA, ss.

To the State of Texas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of criminal appeal of the State of Texas, at Tyler, Texas, wherein Seth Carter is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable presiding judge of the court of criminal appeals of the State of Texas, this 21st day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

[SEAL.]

J. M. HUNT, *P. J.*

80 On this 29th day of December, in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared Joe Corwin before me, the subscriber, a deputy sheriff of Travis County, Texas, and makes oath that he delivered a true copy of the within citation to C. A. Culberson, governor of the State of Texas, and M. M. Crane, attorney-general of the State of Texas, on the date above set out.

JOE CORWIN,
Deputy Sheriff Travis County, Texas.

Sworn to and subscribed the 29th day of December, A. D. 1898.

[SEAL. JAS. P. HART,
Clerk Dist. Court, Travis Co., Texas.

Fee	$1.50
Affidavit	50
Total	2.00

Indorsed: Filed in the court of criminal appeals at Tyler, Texas, January 3rd, 1898. E. B. Wiggins, clerk.

81 (Indorsement on cover:) File No. 17271. Texas court of criminal appeals. Term No., 193. Seth Carter, plaintiff in error, vs. The State of Texas. Filed January 20, 1899.

No. 193.

Brief of Smith for C. C.

Filed Oct. 20, 1899.

Office Supreme Court U. S.
FILED
OCT 20 1899
JAMES H. MCKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

October Term, 1899.

SETH CARTER, Plaintiff in Error,

vs.

THE STATE OF TEXAS, Defendant in Error.

No. 193.

Brief of Plaintiff in Error.

WILFORD H. SMITH,
E. M. HEWLETT,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

SETH CARTER, *Plaintiff in Error*,

vs.

THE STATE OF TEXAS, *Defendant in Error.*

No. 193.

BRIEF OF PLAINTIFF IN ERROR.

Statement of the Case.

The plaintiff in error, a negro, was indicted at the November Term, 1897, and tried and convicted at the March Term, 1898, of the Criminal District Court of Galveston County, Texas, for the crime of murder, and the death penalty assessed against him. From the judgment of conviction, he appealed to the Court of Criminal Appeals of the State of Texas, which is the highest tribunal of the State of Texas in criminal matters, and the judgment of the lower court was there affirmed; and he now brings his case by writ of error to this court for final review.

The Federal question involved, relates to the matter of discrimination against negroes as jurors, because of

their race and color, in the Criminal District Court of Galveston County, Texas. The question was raised in said court, by the plaintiff in error, before plea was entered, filing a motion to quash the indictment, on the ground of such discrimination (see Record, p. 3), and also filing a motion to quash the panel of petit jurors on the same ground; and after presenting said motions, he asked leave to introduce evidence, and offered to introduce evidence to prove the fact of discrimination, as set out in his said motions, but the court refused to permit the introduction of any evidence on the point, and overruled said motions (see Record, p. 3), and the plaintiff in error reserved bills of exception to the court's ruling.

In the Court of Criminal Appeals, the exceptions to the ruling of the trial court on this Federal question were assigned as error. And after judgment in the Court of Criminal Appeals affirming the judgment of the trial court, the exceptions reserved to the rulings of the trial court on the matter of race discrimination were especially presented to the attention of the Court of Criminal Appeals, by the plaintiff in error, in his motion for rehearing. (See Record, pp. 37 and 38.)

Specification of Errors.

I.

The Court of Criminal Appeals should have reversed the case, because of the error in the trial court, in overruling the motion of the plaintiff in error to quash the indictment, and to quash the panel of petit jurors em-

paneled to try the cause; the said motions being made on the ground that the jury commissioners appointed to select the list of jurors from which the panel was drawn which tried the plaintiff in error, selected no persons of color or of African descent, known as negroes, to serve on said grand or petit jury, but on the contrary, did exclude therefrom all persons of color or of African descent, known as negroes, because of their race and color, and that the said grand and petit juries were composed exclusively of persons of the white race, while all persons of the colored race, or persons of African descent, known as negroes, although consisting of and constituting about one-fourth of the population and of the registered voters in said city and county of Galveston, and although otherwise qualified to serve as such grand and petit jurors, were excluded therefrom on the ground of their race and color, and have been so excluded from serving on any jury in said Criminal District Court for a great number of years, which is a discrimination against the plaintiff in error, since he is a person of color and of African descent, known as a negro, and that such discrimination is a denial to him of the equal protection of the laws, and of his civil rights guaranteed by the Constitution and laws of the United States; to which ruling of the court the plaintiff in error duly excepted, which exception appears of record in the case. (See Record, pages 22 and 23.)

II.

The Court of Criminal Appeals should have reversed

the decision because of the error in the trial court in refusing to permit the plaintiff in error to introduce evidence in support of, and to prove the allegations of his motions to quash the indictment, and to quash the panel of petit jurors empaneled to try said cause, and in overruling said motions without permitting an investigation of the matters of fact therein alleged; to which action of the court the plaintiff in error duly excepted, which exception appears of record in the case.

To better illustrate the errors of the trial court, upon which we rely for a reversal in this Court, we here insert Bills of Exceptions Nos. 1 and 2.

Bill of Exception No. 1.

STATE OF TEXAS *vs.* SETH CARTER. } No. 11876. In Crim. Dist. Ct. Gal. Co., Tex., M'ch Term, A. D. 1898.

Be it remembered that on the 17th day of March, 1898, the above-entitled and numbered cause was called for trial, and the defendant in open court, before he was arraigned, and before pleading to the indictment, presented and read to the court the following motion to quash the said indictment, to wit:

And now comes the said defendant, in his own proper person, and moves the court to set aside and quash the indictment herein against him, because the jury commissioners appointed to select the grand jury which found and presented said indictment selected no persons or person of color, or of African descent, known as negroes, to serve on said grand jury; but on the contrary, did exclude from the list of persons to serve as such grand jurors all colored persons or persons of African descent,

known as negroes, because of their race and color, and that said grand jury were composed exclusively of persons of the white race, while all persons of the colored race or persons of African descent, known as negroes, although consisting of and constituting about one-fourth of the population and of the registered voters in said city and county of Galveston, and although otherwise qualified to serve as such grand jurors, were excluded therefrom on the ground of their race and color, and have been so excluded from serving on any jury in said criminal district court for a great many years, which is a discrimination against the defendant, since he is a person of color and of African descent, known as a negro; and that such discrimination is a denial to him of the equal protection of the laws and of his civil rights guaranteed by the Constitution and laws of the United States; all of which the defendant is ready to verify.

SETH CARTER.

Sworn to and subscribed before me this 13th day of January, 1898.

[SEAL.] FLORENCE T. ATKINS,
Notary Public in and for Gal. Co., Tex.

After reading the said motion, the defendant asked leave of the court to introduce witnesses, and offered to introduce witnesses to prove and sustain the allegations therein made, but the court refused to hear any evidence in support of the said motion, and thereupon overruled the same without investigating into the truth or falsity of the allegations of said motion; to which action of the court the defendant then and there excepted, and tenders this his first bill of exceptions, and asks that the same be signed and filed as a part of the record in this case.

WILFORD H. SMITH,
Attorney for Seth Carter.

The foregoing bill of exceptions is approved, allowed, and ordered to be filed by the clerk as a part of the record in this case, this 30th day of March, 1898.

E. D. CAVIN,
Judge of the Criminal District Court,
Galveston County, Texas.

Bill of Exception No. 2.

THE STATE OF TEXAS *vs.* SETH CARTER. } No. 11876. In the Criminal Dist. Court, Galveston County, Tex. March Term, 1898.

Be it remembered that on the 17th day of March, 1898, at the trial of the above-entitled case, after the jury had been selected, duly accepted by both parties, empaneled, and sworn according to law to try said cause, but before the introduction of any evidence in the case, the defendant presented and read to the court the following motion to quash the panel of petit jurors selected to try said case, to wit:

And now comes the said defendant in his own proper person and moves the court to set aside and quash the panel of petit jurors selected and summoned to try him in the case herein, because the jury commissioners appointed to select the list of petit jurors, from which the present panel were drawn, selected no persons of color or African descent, known as negroes, so that they might be drawn on said panel, but that said jury commissioners excluded from the list of persons selected to serve as petit jurors for this term of this court all persons of color or of African descent, known as negroes, because of their race and color, and that said panel, as well as the list of jurors selected for the entire term of this court, is composed exclusively of persons of the white race, while all

persons of the colored race or persons of African descent, known as negroes, although constituting about one-fourth of the population and of the registered voters in the city and county of Galveston, and although otherwise qualified to serve as jurors, were excluded therefrom on the ground of their race and color, and that they have been so excluded from serving on any jury in this court for a great many years, which is a discrimination against the defendant, since he is a person of color and of African descent, known as a negro, and that such discrimination is a denial to him of the equal protection of the laws and of his civil rights, guaranteed by the Constitution and laws of the United States; all of which the defendant is ready to verify.

SETH CARTER.

Sworn to and subscribed before me this 13th day of January, 1898.

FLORENCE T. ATKINS,

[SEAL.] *Notary Public in and for Galveston Co., Tex.*

After reading the said motion the defendant asked leave of the court to introduce witnesses, and offered to introduce witnesses to prove and sustain the allegations therein made; but the court refused to hear any evidence in support of the said motion, and thereupon overruled the same without investigating the truth or falsity of the allegations of the said motion; to which action of the court the defendant then and there excepted, and tenders this, his second bill of exceptions, and asks that the same be signed and filed as a part of the record in this case.

WILFORD H. SMITH,

Attorney for Seth Carter.

The foregoing bill of exceptions is approved, allowed, and ordered to be filed as a part of the record in this cause, this 30th day of March, 1898.

E. D. CAVIN,
Judge of Crim. Dist. Court of Gal. Co., Tex.

Argument.

The question of race discrimination against negroes in the courts of the States of the Union has been so recently and repeatedly before this court that it is hardly necessary to do more than state the case to obtain the proper application of the law.

The case at bar differs, however, from the recent cases of Gibson, Smith and Williams *against* the State of Mississippi (162 U. S. and 170 U. S.) in that the plaintiff in error here asked leave to introduce evidence, and offered to introduce evidence in support of his motions to quash the indictment, and the panel of petit jurors, and was denied this right by the court, who refused to hear any evidence upon the point. (See Exceptions 1 and 2, Record, pp. 22 and 23.)

This case hinges upon that one point. The question is whether or not the tender of proof (which the court refused to hear) by the plaintiff in error, in the trial court, of the allegations of race discrimination in the empanelment of the juries in that court, as set forth in his motions, was sufficient to obtain for him a reversal in this court?

The plaintiff in error advances the following propositions in support of his contention that the offer of proof

was sufficient, and the case should be sent back for a new trial:

First Proposition.

Asking leave to introduce witnesses and offering to introduce witnesses in a case then on trial, manifestly implies that the witnesses were present in court ready to come forward to testify, and it was not necessary that the names of the witnesses should have been inserted in the record, nor the testimony which they would have given.

Second Proposition.

But admitting, for the sake of argument, that the names of the witnesses should have been given, and the nature and character of the evidence sought to be introduced should have been set out in the bills of exception, yet when the presiding judge certifies that "he refused to hear any evidence," the necessity for further particularity in the nature of the proof offered ceases to be material.

Third Proposition.

Since the motions addressed to the trial court Federal questions, which were subject to ultimate determination in this Court, it was the bounden duty of that court, under the decisions of this Court, to permit the introduction of any evidence whatever, bearing upon the question, or tending to prove the issue, in order that this Court might be enabled to say whether or not the issue was established from the proof appearing in the record.

Gibson *v.* Miss., 162 U. S., 565.

Williams *v.* Miss., 170 U. S., 213.

Fourth Proposition.

By arbitrarily refusing to hear any evidence offered by the plaintiff in error in support of his motions charging the denial of sacred rights guaranteed by the Constitution of the United States, the trial court has placed the State of Texas, before this Court, in the position of a person who suppresses or destroys evidence which he ought to introduce, or to which the other party is entitled; and the rule *omnia præsumuniur contra spoiliatorem* ought to apply.

Fifth Proposition.

It will open wide the door to judicial oppression to permit the State courts in this way to nullify the amendments to the Constitution and overturn the decisions of this tribunal, upholding and giving expression to the rights of negroes to the equal protection of the laws, by arbitrarily refusing to allow the introduction of proof in support of motions, or other pleadings, calling the attention of this Court to injustices and wrongs upon their rights under the Federal Constitution, in the administration of State laws.

Neal *v.* Delaware, 103 U. S., 370.

Yick Wo *v.* Hopkins, 118 U. S., 356.

For these reasons, we respectfully ask that this judgment assessing the death penalty be reversed and a new trial granted.

WILFORD H. SMITH,
E. M. HEWLETT,
Attorneys for Plaintiff in Error.

No. 193.

In Supreme Court of the United States,

October Term, 1899.

SETH CARTER, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR, THE STATE OF TEXAS, BY HER ATTORNEY-GENERAL, T. S. SMITH.

STATEMENT OF THE CASE.

The plaintiff in error, Seth Carter, brings this case to the Supreme Court of the United States by means of a writ of error, issued December 16, 1898, out of the Circuit Court of the United States for the Eastern District of Texas, directed to the Court of Criminal Appeals of the State of Texas, which said court is the court of last resort in the State of Texas for all criminal causes. As there is no brief on file in the United States Supreme Court on behalf of the plaintiff in error, the State of Texas, by her Attorney-General, T. S. Smith, files this brief for the State of Texas, defendant in error, and relies for the facts of the case and for the assignments of error upon which a reversal of the case is sought, upon the printed "transcript of record" filed herein on the 20th day of January, 1899.

This cause originated in the county of Galveston, and State of Texas. On the 26th day of November, 1897, the grand jury in and for Galveston county presented to and caused to be filed in the Criminal District Court of Galveston county, an indictment against plaintiff in error, charging him with murder of Bertha Brantley, on November 24, 1897. (Tr., p. 2.)

On March 7th, 1898, the court entered an order for the clerk of the court to issue a writ commanding the sheriff of Galveston county to summon 150 persons, whose names appear on the list to be attached to said writ, to be and appear before the Criminal Dis-

trict Court of Galveston county, at 10 o'clock a. m., March 17, 1898, the day set for the trial of plaintiff in error, to serve as jurors in the trial thereof. (Tr., pp. 2 and 3.) Upon the day set for the trial of the cause, the plaintiff in error filed the following motion to quash the indictment:

"The State of Texas, Galveston County:

State of Texas, vs. Seth Carter. } No. 11,876.

In the Criminal District Court, March term, 1898.

And now comes the said defendant, in his own proper person, and moves the court to set aside and quash the indictment herein against him, because the jury commissioners appointed to select the grand jury which found and presented said indictment selected no person or persons of color or of African descent, known as negroes, to serve on said grand jury, but, on the contrary, did exclude from the list of persons to serve as such grand jurors all colored persons or persons of African descent, known as negroes, because of their race and color, and that said grand jury were composed exclusively of persons of the white race, while all persons of the colored race, or persons of African descent, known as negroes, although consisting of and constituting about one-fourth of the population and of the registered voters in said city and county of Galveston, and, although otherwise qualified to serve as such grand jurors, were excluded therefrom on the ground of their race and color, and have been so excluded from serving on any jury in said criminal district court for a great many years, which is a discrimination against the defendant, since he is a person of color and of African descent, known as a negro, and that such discrimination is a denial to him of the equal protection of the laws and of his civil rights guaranteed by the Constitution and laws of the United States; all of which the defendant is ready to verify.

"SETH CARTER."

"Sworn to and subscribed before me this 13th day of January, 1898.

FLORENCE T. ATKINS,

"Notary Public, Galveston county, Texas."

"Filed March 17, 1898.

C. J. ALLEN,

"Clerk of the Criminal District Court, Galveston county, Texas."

The court overruled the motion, to which ruling the plaintiff in error reserved his bill of exceptions. (Tr., p. 4.)

An examination of the record fails to disclose the fact, if such were the fact, that any witness or witnesses were introduced to testify upon the allegations as contained in the motion to quash the indictment; at least, no witness was tendered to the court.

"Bill of Exceptions, No. One. Filed March 30, 1898.

The State of Texas, vs. Seth Carter. } No. 11,876.

In the Criminal District Court, Galveston county, Texas, March term, A. D. 1898.

Be it remembered that on the 17th day of March, 1898, the above entitled and numbered cause was called for trial, and the defendant, in open court, before he was arraigned, and before pleading to the indictment, presented and read to the court the following motion to quash the said indictment, towit:

(Here follows copy of motion to quash as shown above herein.)

After reading the said motion, the defendant asked leave of the court to introduce witnesses, and offered to introduce witnesses to prove and sustain the allegation therein made, but the court refused to hear any evidence in support of the said motion, and thereupon overruled the same without investigating into the truth or falsity of the allegations of said motion; to which action of the court the defendant then and there excepted, and tenders this his first bill of exceptions, and asks that the same be signed and filed as a part of the record in this case.

WILFORD H. SMITH.
"Attorney for Seth Carter."

"The foregoing bill of exceptions is approved, allowed and ordered to be filed by the clerk as a part of the record in this cause, this 30th day of March, 1898.

E. D. CAVIN.
"Judge of the Criminal District Court of Galveston Co., Texas."

Plaintiff in error presents and has the court to allow his bill of exceptions No. 2, filed March 30, 1898. (See Tr., pp. 23 and 24.)

The printed record of the case does not disclose the motion to quash the panel of petit jurors, except as the same is included in

bill of exceptions No. 2, as shown above. Other bills of exceptions are filed in the case, but it is not necessary to further refer to them in this brief, as they present no *Federal question* whatever. The plaintiff in error was convicted of murder in the first degree and his punishment assessed at death.

On March 19, 1898, he filed his motion for a new trial, and included therein the grounds as set out in bills of exceptions Nos. 1 and 2. (Tr., p. 27.) This motion was overruled by the court on the same day. (Tr., p. 29.)

After the motions for new trial and arrest of judgment were overruled, notice of appeal to the Court of Criminal Appeals was duly given and entered of record. (Tr., p. 29.)

An opinion was filed and delivered June 8, 1898, by the Court of Criminal Appeals, the court of last resort in Texas in all criminal matters, which affirmed the opinion of the Criminal District Court of Galveston county.

A motion for rehearing of the case was filed June 18, 1898, by plaintiff in error. (Tr., p. 37.)

The Court of Criminal Appeals delivered a lengthy opinion upon the motion for rehearing, December 7, 1898, overruling said motion. (Tr., pp. 39-44.)

Upon the 16th day of December, 1898, a writ of error to the judges of the Court of Criminal Appeals of the State of Texas, issued out of the Circuit Court of the United States for the Eastern District of Texas.

The following are the assignments of error filed December 21st, 1898, by plaintiff in error:

"Seth Carter, Plaintiff in Error, vs. The State of Texas, Defendant in Error. } In the Court of Criminal Appeals of the State of Texas.

And now comes the said plaintiff in error, by his attorney, and makes the following assignment of error in the rulings and proceedings of the court below, upon which he relies, and expects to obtain a reversal in the Supreme Court of the United States, towit:

FIRST ASSIGNMENT OF ERROR.

Because the Court of Criminal Appeals should have reversed the case because of the error in the trial court in overruling the defend-

ant's motion to quash the indictment, and to quash the panel of petit jurors empaneled to try the cause, the said motions being made on the ground that the jury commissioners appointed to select the list of petit jurors from which the panel was drawn which tried the plaintiff in error selected no persons of color or of African descent, known as negroes, to serve on said grand or petit jury, but, on the contrary, did exclude therefrom all persons of color or of African descent, known as negroes, although consisting of and constituting about one-fourth of the population and of the registered voters in said city and county of Galveston, and although otherwise qualified to serve as such grand and petit juries, were excluded therefrom on the ground of their race and color, and have been so excluded from serving on any jury in said Criminal District Court for a great number of years, which is a discrimination against the plaintiff in error, since he is a person of color and of African descent, known as a negro; and that such discrimination is a denial to him of the equal protection of the laws, and of his civil rights guaranteed by the Constitution and laws of the United States; to which ruling of th court the plaintiff in error duly excepted, which exception appears of record in the case.

SECOND ASSIGNMENT OF ERROR.

Because the Court of Criminal Appeals should have reversed the case because of the error in the trial court in refusing to permit the plaintiff in error to introduce evidence in support of and to prove the allegations of his motions to quash the indictment and to quash the panel of petit jurors empaneled to try said cause and in disposing of said motions without permitting an investigation of the matters of fact therein alleged; to which action of the court the plaintiff in error duly excepted, which exception appears of record in the case.

Wherefore, the plaintiff in error prays that the judgment and sentence of the said trial court and of the said Court of Criminal Appeals of the State of Texas be reversed and held for naught.

WILFORD H. SMITH,

Attorney for Seth Carter, Plaintiff in Error."

It is not considered necessary in this brief to attempt to review the testimony of the great number of witnesses in the case in order

to make out, on behalf of defendant in error, a case of murder in the first degree. The testimony shows that plaintiff in error was desperately in love with Bertha Brantley long before she obtained a divorce from her husband, which occurred November 12th, 1897, just twelve days before her death. This was a case of deliberate murder in the first degree, perpetrated by plaintiff in error, arising out of his enraged jealousy upon hearing that Alberta was about to remarry Dennis Brantley.

ARGUMENT.

This is not a case in which there was any attempt to remove the case from the Criminal District Court of Galveston county into the Circuit Court of the United States by or under the authority of Article 641, Revised Statutes of the United States.

There is no allegation made nor question raised that the Constitution or laws of the State of Texas in any way discriminated against the negro because of his race or color, or on account of his previous condition of servitude. The only question presented is whether plaintiff in error has been denied by the State courts any rights, franchises or immunities as guaranteed him by the Federal Constitution and laws. If he has, then under the decisions of this court his injury can be redressed by the exercise of the revisory power of this court. The plaintiff in error alleges that he was discriminated against because of his race and color, and denied his civil rights under the Constitution and laws of the United States, for the alleged reason that the jury commissioners, consisting of three persons, whose duty it is under the laws of the State of Texas to select grand and petit jurors for the ensuing term of the court, failed to select any negroes to be members of said grand jury and petit jury because of their race and color. He further alleges in his motion to quash the indictment that negroes have been excluded from serving on any jury in said Criminal District Court for a great many years on account of their race and color, which is a discrimination against him and a denial to him of his just rights under the Federal Constitution and laws, because he is a person of color, known as a negro.

The Act of Congress of March 1st, 1875, Chap. 114, provides that "no citizen, possessing all other qualifications which are or

may be prescribed by law, shall be disqualified from service as grand or petit jurors in any court of the United States, or of any State, on account of race, color or previous condition of servitude."

In the case of Neal vs. Delaware, 103 U. S., it was conceded in the court below as well as in argument before this court that colored persons had always been excluded from juries in the courts of Delaware. In that case, it was shown that the Constitution and laws passed before the war and which excluded negroes from suffrage and from serving on juries had never been changed after the adoption of the thirteenth, fourteenth and fifteenth amendments to the Federal Constitution and laws which were passed to carry out the purpose of said amendments, but this court held that in view of the fact that the Court of Oyer and Terminer of Delaware recognized the Federal Constitution and laws as being the supreme law of the land, it made no difference that such *formal* change had not been effected. Such is not the case with the State of Texas. Her Constitution and laws have been made to conform to the Federal Constitution and laws. If it were a matter of which the State court could take judicial cognizance, as to her citizens of all color serving on grand and petit juries, as mention of such is made in this case, page 397, then could the Court of Appeals of Texas take such judicial knowledge, because it is consistent with both the law and the facts.

It is not conceded, as in the case of Neal vs. Delaware, that negroes are excluded from the juries in this State, but it is denied that such is the case, and the presumption is that they vote and serve on juries. The contrary must be proved when it is so alleged. In the case above cited, the accused made a motion to have subpœnas issued for the commissioners of the levy court, which court makes the annual selection of grand and petit jurors, also for the clerk and bailiff of said levy court. This was objected to by the attorney-general of the State of Delaware, the motion to quash the indictment and panel of petit jurors having already been passed upon. The motion for subpœnas was denied by the court on the ground that it was without precedent and was not according to the practice of the Court of Oyer and Terminer.

In this case the Supreme Court says: "But passing by this ruling of the court below as insufficient in itself to authorize a reversal of the judgment, we are of the opinion that the motions to quash, sustained

by the affidavit of the accused—which appears to have been filed in support of the motions without objection to its competency as evidence, and was uncontradicted by counter affidavits, or even by a formal denial of the grounds assigned—should have been sustained. If, under the practice which obtains in the courts of the State, the affidavit of the prisoner could not, if objected to, be used as evidence in support of a motion to quash, the State could waive that objection, either expressly or by not making it at the proper time. No such objection appears to have been made by its Attorney-General. On the contrary, the agreement that the prisoner's verified petition should be treated as an affidavit 'in the consideration and decision of the motions,' implied, as we think, that the State was willing to risk their determination upon the case as made by that affidavit, in connection, of course, with any facts of which the court might take judicial notice."

The Supreme Court of the United States, following the above language, says that the showing as made by the affidavit, together with the fact that no colored citizen had ever been summoned as a juror in the State, which fact was so generally known that the court felt bound to take judicial knowledge of it, made out a *prima facie* case against the State, through her subordinate officers, of a discrimination against the accused, hence a denial to him of his rights as a citizen under the Federal Constitution and laws.

The case at bar, however, is not such a case as the one above considered. There was no petition for removal of the cause into the Circuit Court of the United States verified by the accused; no agreement on the part of counsel for the accused and the prosecuting attorney that the affidavit of plaintiff in error could be used as proof of the allegations contained in his motions to quash the panel of grand jurors and the panel of petit jurors; no fact of which the district judge could take judicial cognizance, such as that no negro had ever sat on the jury in the courts of the State of Texas. All these things, the necessary and material elements in the denial of his civil rights to the accused in the case of Neal vs. Delaware, are wanting in the case at bar. Here we have a record showing that the motion to quash the indictment was sworn to on the 13th day of January, 1898, and came up for a hearing on the trial of the cause March 17th, 1898, more than two months thereafter. Under the practice of the trial courts of this State, the accused should, before

the case was called for trial, have caused to be issued subpœnas for the witnesses by whom he expected to prove the allegations in his motion. He should have tendered the witnesses in person and by name to the court, and if the court refused to hear testimony, then and there, by his attorney, the accused had the right to take time to prepare his bill of exceptions and to put therein what he expected to prove by each witness. Article 724 of the Code of Criminal Procedure, R. S. of Texas, 1895, is as follows: "On the trial of any criminal action the defendant, by himself or counsel, may tender his bill of exceptions to any decision, opinion, order or charge of the court or other proceedings in the case, and the judge shall sign such bill of exceptions, under the rules prescribed in civil suits, in order that such decision, opinion, order or charge may be revised upon appeal."

Under the procedure of the State of Texas, if there is a direct conflict between a fact as stated in the statement of facts and as given in a bill of exceptions, the higher court will look to the bill of exceptions as correctly stating the fact. However, it is not to be understood that the approval by the trial court of a bill of exceptions as tendered by the accused and an order to file same, is an admission by the court that everything contained therein *is true* as a matter of fact.

In the case of Henry Smith vs. The State of Texas, 4 Texas Ct. of Appeals Rep., 630, the defendant was convicted and made a motion for a new trial, which was overruled by the court, and to which ruling the defendant saved his bill of exceptions. In this bill of exceptions, defendant sets out the grounds which were urged for a new trial. The court allowed the bill of exceptions and ordered it to be filed. In the Court of Criminal Appeals, the appellant claimed that the bill of exceptions showed "that actually and in fact there was no plea entered for defendant." The court says: "The specific fact, and the only specific fact, established and sought to be established by the bill was, as we apprehend, that the defendant's motion for a new trial had been overruled, and not that the court intended to admit and certify the fact that the grounds set out in the motion were true and well taken. No other construction is warranted by the bill as stated. Else why, if it be held to certify the fact that no plea was entered, might it not with the same propriety be held that the bill also certifies as facts the two other grounds

of the motion, viz.: 'First, that the verdict of the jury was contrary to the law and to the evidence; second, the verdict of the jury was excessive.'" "We cannot believe that the court in allowing the bill, ever intended to admit as a fact that the verdict was contrary to the law and the evidence or that it was excessive, and yet at the same time have placed itself upon the record as having refused him a new trial, in the face of such facts. To do so would be worse than absurdity; it would be equivalent to a criminal stultification of itself by the court."

In the case of Hennessy vs. The State, 23 Texas Ct. of App. Rep., p. 355, the following language is used: "VII. It is not made to appear that the court erred in overruling defendant's motion to quash and set aside the list of jurors presented him. We are not informed by the bill of exceptions relating to this matter what the facts were concerning the grounds of said motion. By *signing* and *allowing* the said bill the judge did not establish the truth of the grounds set forth in said motion, but simply certified that such a motion had been presented to him for action, and that he had overruled it. In this state of the case we must presume that the objections urged to the list of jurors were not sustained by the facts."

We suggest to this court the distinction which is made in the practice in the Court of Criminal Appeals of Texas, between the case where there is a direct conflict between the statement of facts and a bill of exceptions, and the case of approval of a bill of exceptions and ordering the same filed. In the cases cited above, it is clearly shown that it is not intended by the trial court to accept as true a fact or facts stated in a motion which has been incorporated in a bill of exceptions, nor to verify nor accept as true any statement made by accused or his counsel which is included in the bill of exceptions, simply by approving same and ordering it made a part of the record. That part of the record in this case which involves the point being discussed appears as follows (Tr., pp. 3 and 4):

"The State of Texas,
vs.
Seth Carter. } No. 11,876. Indicted for Murder.

This day this cause was called, and the State appeared by her district attorney, and the defendant, Seth Carter, appeared in person, his counsel also being present, and then came on to be heard the defendant's motion to quash and set aside the indictment herein; and

the same having been heard by the court, it is considered, ordered, and adjudged by the said court that the said motion be, and the same is, in all things overruled, to which ruling of the court the defendant, Seth Carter, in open court excepted."

It is to be presumed that the honorable judge of the trial court did his duty in giving a hearing to the motion of the accused; and it is not left to presumption merely to vindicate him in this respect, if he needed any vindication, but the record itself speaks out in the language above quoted "the same having been heard by the court," and elucidates this part of the discussion. It is an elementary principle of the law, that in our dual system of government, the State and Federal governments are supreme in their respective jurisdictions; but that in case of a conflict, the Federal Constitution and laws of Congress are the supreme law of the land in the sphere of delegated powers. The courts of Texas know this. The motion to quash the indictment raises a question foreign to the record so far as the trial court is concerned, and requires extraneous proof to substantiate the averment. It was a matter of which the court could not take judicial knowledge, either to say that the averment was true or untrue. It required positive proof that the accused was discriminated against on account of his race and color in this particular case at bar, regardless of what had been done by jury commissioners previously thereto. A uniform course of action in this respect might have great weight in determining the question of discrimination in the particular case. To conclude that the court intended, by merely approving the bills of exception and ordering the same filed, to say thereby that the grounds urged in the motions to quash which were included in said bills were true and that the jury commissioners had discriminated against the accused on account of his race and color; or, that the averment of counsel for plaintiff in error to the effect that the court refused to hear any testimony whatever upon the issue raised, which issue, if proved true, was a violation of the spirit and letter of the Constitution and laws of the United States, would be a stultification of himself and which under the clearly expressed views of this court meant a reversal.

It is to be presumed that the trial court did his duty in the premises. It is to be presumed that, at the time he passed upon the motion to quash the indictment, he knew the law of the United States as expressed in the solemn declarations of the highest and

most honorable judicial tribunal of this republic. At the time he approved the bills of exceptions and ordered the same filed, he is presumed to have done so in view of the procedure and practice of the courts of Texas, as expressed by her highest court in criminal matters, viz.: the Court of Criminal Appeals. It may be argued that the trial court should have obviated all difficulty in this matter by having limited or qualified anything contained in the bill of exceptions before having approved same. But in the administration of the criminal laws of this State, and in view of the great amount of work incumbent upon our trial judges and their arduous duties of properly passing upon the admissibility of testimony and properly preparing and giving in charge to the juries the law applicable to the case; and further, in this case, in view of the fact that all these bills of exception were presented for approval some two weeks after the trial of the cause, and just on the day before adjournment of the court, it is not to be supposed that the court would take into consideration every possible view which might arise afterwards upon more mature consideration. It is evident that the Court of Criminal Appeals of Texas did not conclude that the trial court, by his approval of the bills of exceptions, intended to assert as true the statements therein contained. The court uses the following language in their opinion on the motion for a rehearing in this case (Tr., p. 44): "But it is said that here appellant offered to prove the allegations of his motion and the court refused to permit him." The language used in the Smith case, *supra,* in the motion, also contains a proffer to prove the allegations of the motion by the officers selecting the jury, and prayed for subpœnas for said officers. But the court, in deciding the question, ignored this offer, presumably on the ground of its insufficiency as being too vague, and, in fact, because the testimony of no witness was offered in support of the motion.

The proposition contained in the motion here is still more vague and general. It names no witness or person by whom it was proposed to prove the allegations of the motion. Under the practice in our courts, and we believe under the practice of all courts, a bare proposition to prove certain facts without tendering the witness or witnesses, or stating by whom it was proposed to prove them, would not be sufficient to invoke the action of the court. And the bare recitation that the court refused to hear evidence in support of

said motion is without meaning, because in fact no testimony was tendered by appellant * * *. At any rate, the bill of exceptions on this subject should be so framed as to include all matters sufficient to overcome the presumption of the correctness of the ruling complained of."

In the case of Bush vs. Kentucky, reported in the 107 U. S. Reports, pp. 120-123, the same question is involved as in the case at bar. The statutes and decisions of Kentucky are reviewed by this court. After the adoption of the fourteenth amendment to the Federal Constitution, the legislature of Kentucky twice passed statutes prohibiting persons of the African race from serving as grand or petit jurors. This remained the statutory law of Kentucky till January 26th, 1882. However, the Court of Appeals of Kentucky delivered an opinion June 29th, 1880, in the case of Commonwealth vs. Johnson, in which they declare that the statute law of Kentucky is unconstitutional in so far as it is in conflict with the expressed views of the Supreme Court of the United States, and that henceforth "no person can be lawfully excluded from any jury on account of his race or color." "This question has not been heretofore passed on by this court, and as the duty of selecting and summoning juries is devolved upon merely ministerial officers, we ought to *assume* that, in performing their duties, they obeyed the statute as enacted by the Legislature, and that they excluded colored persons from the jury because the statute declares them to be incompetent, and consequently that the appellee was deprived by the statute of a right which the Supreme Court holds is secured to him by the Constitution."

The grand jury which indicted Bush was selected by jury commissioners appointed before the decision above quoted from. This being the case, it made no difference that it was not shown, by bill of exceptions or otherwise, that any proof was offered in support of the motion to quash or set aside the indictment. It was a question of law, not one of fact. This court says: "We are of opinion that the rule announced by the Court of Appeals in Commonwealth vs. Johnson is consistent with sound reason and public policy; and, in conformity therewith,—in the absence of any evidence that the selection of grand jurors, in May, 1880, was in fact made without discrimination against colored citizens, because of their race,—it should be assumed that the jury commissioners then appointed fol-

lowed the statutes of Kentucky so far as they restricted the selections of grand jurors to citizens of the white race."

Thus it will be seen from the decisions of this court, as well as State courts, that some importance is attached to the presumption that public officers have followed the law in the performance of their official duties. This is as it should be. Especially, we think, ought this to be the rule with reference to our judiciary. It is unnecessary to consider the question as to whether or not the trial court erred in overruling the motion to quash the panel of petit jurors. The trial court may have viewed the motion as did the Court of Criminal Appeals, viz.: that it came too late to be considered, because plaintiff in error had already examined the venire on their *voir dire*, and had passed on each in the box as to his bias or prejudice in the particular case, and had accepted twelve good and lawful men to pass upon his case. We will not discuss this phase of the case for the reason that if the motion to quash the indictment should have been sustained by the trial court, it would have to be sustained because, in the opinion of this court, the jury commissioners discriminated against plaintiff in error in the selection of grand jurors. If this were true, he was discriminated against in the selection, also, of petit jurors who tried him. If not for the reason just given, then because the bill of exceptions contains the statement that the trial court refused to hear any proof on the question of discrimination. If this court should think that this discloses sufficient error to require a reversal of the case, it would apply to the one motion as well as the other.

It is not claimed by plaintiff in error that he was not legally tried by a jury of twelve fair and impartial men. We submit that as presented by the record, the case is such a one as merits the punishment assessed, and we, therefore, respectfully ask that this honorable court affirm the judgment as rendered by the Court of Criminal Appeals of the State of Texas.

T. S. Smith, Attorney-General,
For Defendant in Error.

the case.

177 442
44 L-ed 839
185 [2]152

177 442
44 L-ed 839
20 SC 687
188 [5]521

CARTER *v.* TEXAS.

ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

No. 193. Submitted March 16, 1900. — Decided April 16, 1900.

Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. And when a defendant has had no opportunity to challenge the grand jury which found the indictment against him, the objection to the

constitution of the grand jury upon this ground may be taken, either by plea in abatement, or by motion to quash the indictment, before pleading in bar.

The question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the State.

A person of the African race was indicted, in an inferior court of a State, for a murder committed since the impanelling of the grand jury; and, before pleading in bar, presented and read to the court a motion to quash, duly and distinctly alleging that all persons of the African race were excluded, because of their race and color, from the grand jury which found the indictment; and, as was stated in his bill of exceptions allowed by the judge, thereupon offered to introduce witnesses to prove that allegation, but the court refused to hear any evidence upon the subject, and, without investigating whether the allegation was true or false, overruled the motion, and the defendant excepted. After conviction and sentence, he appealed to the highest court of the State in which a decision in the case could be had. That court affirmed the judgment, upon the assumption that the defendant had introduced no evidence in support of the motion to quash. *Held*, that this assumption was plainly disproved by the statements in the bill of exceptions; and that the judgment of affirmance denied to the defendant a right duly set up and claimed by him under the Constitution and laws of the United States, and must therefore be reversed by this court on writ of error.

THE case is stated in the opinion of the court.

Mr. Wilford H. Smith and *Mr. E. M. Hewlett* for plaintiff in error.

Mr. T. S. Smith for defendant in error.

MR. JUSTICE GRAY delivered the opinion of the court.

At November term, 1897, of the criminal district court, held at the city of Galveston for the county of Galveston and State of Texas, the grand jury, on November 26, 1897, returned an indictment against Seth Carter for the murder on November 24, 1897, of Bertha Brantley, both being of the negro race.

The record states that at March term, 1898, when the case was called for trial, the defendant, in open court, and before he

had been arraigned, or had pleaded to the indictment, presented and read to the court a motion to quash the indictment.

The motion to quash was signed and sworn to by the defendant, and was in these words: "And now comes the said defendant, in his own proper person, and moves the court to set aside and quash the indictment herein against him, because the jury commissioners, appointed to select the grand jury which found and presented said indictment, selected no person or persons of color or of African descent, known as negroes, to serve on said grand jury; but, on the contrary, did exclude from the list of persons to serve as such grand jurors all colored persons or persons of African descent, known as negroes, because of their race and color; and that said grand jury were composed exclusively of persons of the white race, while all persons of the colored race or persons of African descent, known as negroes, although consisting of and constituting about one fourth of the population and of the registered voters in said city and county of Galveston, and although otherwise qualified to serve as such grand jurors, were excluded therefrom on the ground of their race and color, and have been so excluded from serving on any jury in said criminal district court for a great many years, which is a discrimination against the defendant, since he is a person of color and of African descent, known as a negro; and that such discrimination is a denial to him of the equal protection of the laws, and of his civil rights guaranteed by the Constitution and laws of the United States. All of which the defendant is ready to verify."

The record further shows that the court overruled the motion, and to that ruling the defendant excepted in open court; that the defendant was then arraigned and pleaded not guilty, and was tried and convicted by a jury, and adjudged guilty by the court, of murder in the first degree; and that a bill of exceptions was tendered by him, and was by the presiding judge approved, allowed and ordered to be made part of the record, which stated that, "after reading the said motion, the defendant asked leave of the court to introduce witnesses, and offered to introduce witnesses, to prove and sustain the allegations therein made; but the court refused to hear any evidence in

support of the said motion, and thereupon overruled the same, without investigating into the truth or falsity of the allegations of said motion; to which action of the court the defendant then and there excepted."

The defendant appealed to the Court of Criminal Appeals of the State of Texas, (being the highest court of the State in which a decision in the case could be had,) which affirmed the judgment, and denied a motion for a rehearing. The opinions delivered by that court upon affirming the judgment, and upon denying the motion for a rehearing, are set out in the record, and are reported in 39 Texas Crim. 345. The defendant sued out this writ of error.

The Code of Criminal Procedure of the State of Texas contains the following provisions:

"ART. 397. Any person, before the grand jury have been impanelled, may challenge the array of jurors, or any person presented as a grand juror; and in no other way shall objections to the qualifications and legality of the grand jury be heard. Any person confined in jail in the county shall, upon his request, be brought into court to make such challenge."

"ART. 559. A motion to set aside an indictment" "shall be based on one or more of the following causes, and no other: 1. That it appears by the records of the court that the indictment was not found by at least nine grand jurors." "2. That some person not authorized by law was present when the grand jury were deliberating upon the accusation against the defendant, or were voting upon the same."

"ART. 561. The only special pleas which can be heard for the defendant are: 1. That he has been before convicted legally, in a court of competent jurisdiction, upon the same accusation, after having been tried upon the merits for the same offence. 2. That he has been before acquitted by a jury of the accusation against him, in a court of competent jurisdiction, whether the acquittal was regular or irregular."

The Court of Criminal Appeals, in its first opinion affirming the judgment of the trial court, disposed of the objection to the grand jury by holding that, by the very terms of article 559, "the fact that people of African descent were not drawn by the

commissioners to serve as jurors upon the grand jury is not a ground for setting aside an indictment;" and that the appellant had not undertaken to bring himself within the purview of article 397, as to which the court said: "If there were any objections to the grand jury, or any member of it, they should have been exercised by challenge, either to the array or to a particular member of said body. The question of challenge to the array or to a particular juror is not suggested, nor is it shown that he was debarred this right. It is too late, after indictment found, to question the manner of impanelling a grand jury." 39 Texas Crim. 348, 349.

In the opinion delivered on denying the motion for a rehearing, the court substantially abandoned as untenable the positions taken in its first opinion; and admitted that "in this particular case no opportunity was afforded appellant to challenge the array, because the grand jury which returned the bill against him had been impanelled prior to the commission of this offence," and consequently that a motion to quash the indictment, made after his arrest under it, and before his arraignment, was a proper and timely mode of presenting a fundamental objection under the Constitution and laws of the United States, although no such objection was mentioned in the statutes of the State. And the reasons assigned for denying the rehearing were that "the motion to quash was based simply on the affidavit of appellant," and "the question was presented to the court without any evidence whatever in support of it;" that "in this case the motion to quash was not predicated on the record, but involved extraneous matters, and before the court would be authorized to act, there must be some proof of the allegations contained in the motion;" that "the motion was but a mere tender of the issue, unaccompanied by any supporting testimony;" that "it names no witness or person by whom it was proposed to prove the allegations of the motion;" and that "the bare recitation" (in the bill of exceptions) "that the court refused to hear evidence in support of said motion is without meaning, because in fact no testimony was tendered by appellant." 39 Tex. Crim. 354–357.

The rules of law which must govern this case are clearly established by previous decisions of this court.

Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. *Strauder* v. *West Virginia*, 100 U. S. 303; *Neal* v. *Delaware*, 103 U. S. 370, 397; *Gibson* v. *Mississippi*, 162 U. S. 565.

When the defendant has had no opportunity to challenge the grand jury which found the indictment against him, the objection to the constitution of the grand jury upon this ground may be taken, either by plea in abatement, or by motion to quash the indictment, before pleading in bar. *United States* v. *Gale*, 109 U. S. 65, 67.

The motion to quash on such a ground being based on allegations of facts not appearing in the record, those allegations, if controverted by the attorney for the State, must be supported by evidence on the part of the defendant. *Smith* v. *Mississippi*, 162 U. S. 592, 601; *Williams* v. *Mississippi*, 170 U. S. 213.

But the question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the State. *Neal* v. *Delaware*, 103 U. S. 370, 396, 397; *Mitchell* v. *Clark*, 110 U. S. 633, 645; *Boyd* v. *Thayer*, 143 U. S. 135, 180.

In the case at bar, as may be inferred from the dates appearing in the record, and as is distinctly stated in the opinion delivered by the court below on denying a rehearing, the grand jury had been impanelled before the commission of the offence for which the defendant was indicted. He therefore never had any opportunity to challenge the array of the grand jury, and was entitled to present the objection on which he relied by motion to quash.

The defendant's motion to quash the indictment was presented to the court before he had been arraigned, or had pleaded to

the indictment. The motion, besides stating that the defendant was of the African race, fully and specifically alleged, with almost the precision of a plea in abatement, that the jury commissioners appointed to select the grand jury selected no persons of African descent to serve on the grand jury, but on the contrary excluded from the list all such persons because of their race and color; that the grand jury was composed exclusively of persons of the white race, while all persons of the African race, although constituting about one fourth of the registered voters in the county, and although otherwise well qualified to serve as such grand jurors, were excluded therefrom on the ground of their race and color, and had been so excluded from serving on any jury in that court for a great many years; and that this was a discrimination against the defendant, and a denial to him of the equal protection of the laws, and of his civil rights guaranteed to him by the Constitution and laws of the United States. And the motion concluded with the statement, "All of which the defendant is ready to verify."

The bill of exceptions tendered by the defendant, and allowed by the presiding judge, and made part of the record by his order, explicitly states that "after reading the said motion, the defendant asked leave of the court to introduce witnesses, and offered to introduce witnesses, to prove and sustain the allegations therein made; but the court refused to hear any evidence in support of the said motion, and thereupon overruled the same, without investigating into the truth or falsity of the allegations of said motion; to which action of the court the defendant then and there excepted."

It thus clearly appears by the record that the defendant, having duly and distinctly alleged, in his motion to quash, that all persons of the African race were excluded, because of their race and color, from the grand jury which found the indictment, asked leave of the court to introduce witnesses, and offered to introduce witnesses, to prove and sustain that allegation; and that the court refused to hear any evidence upon the subject, and overruled the motion, without investigating whether the allegation was true or false.

The defendant having offered to introduce witnesses to prove

the allegations in the motion to quash, and the court having declined to hear any evidence upon the subject, it is quite clear that the omission of the bill of exceptions to give the names of the witnesses whom the defendant proposed or intended to call, or to state their testimony in detail, cannot deprive the defendant of the benefit of his exception to the refusal of the court to hear any evidence whatever. And the assumption, in the final opinion of the state court, that no evidence was tendered by the defendant in support of the allegations in the motion to quash, is plainly disproved by the statements, in the bill of exceptions, of what took place in the trial court.

The necessary conclusion is that the defendant has been denied a right duly set up and claimed by him under the Constitution and laws of the United States; and therefore

The judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.